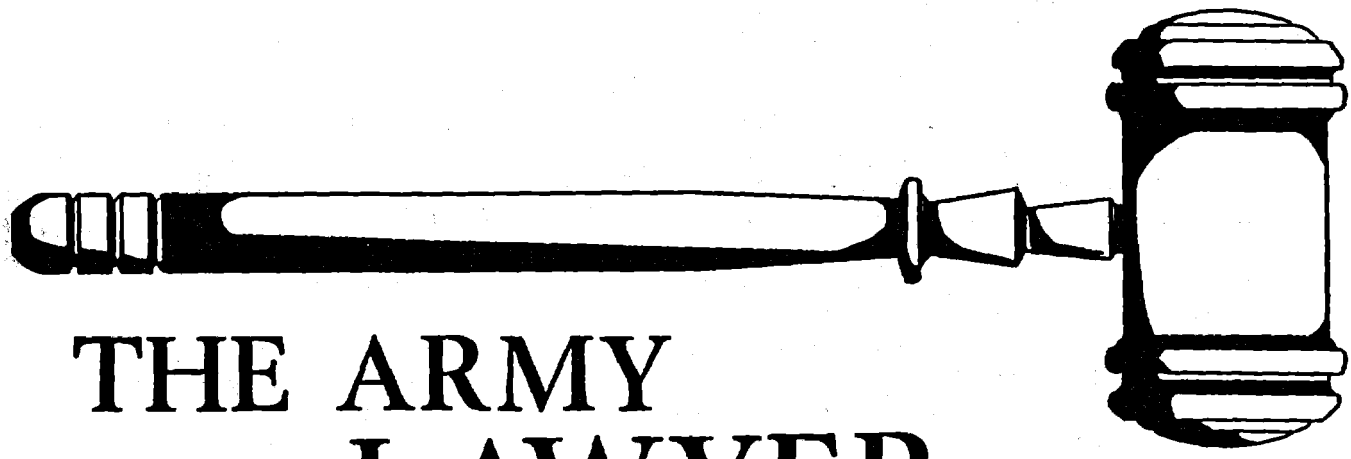

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Probationary and Excepted Service Employee Rights in Disciplinary Actions in the Wake of *Cleveland School Board v. Loudermill*

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I. Introduction

It has been recognized for some time that federal excepted service civilian employees[1] and those serving a probationary period[2] have almost no procedural protections in connection with adverse disciplinary actions.[3] The nature of their service has been found to create no due process right to any,[4] and they have been given none by

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[1] 5 U.S.C. § 2103 (1982). The excepted service consists of those civil service positions which are not in the competitive service or the Service Executive Service. Positions are excepted from the competitive service by statute, executive order, or regulations of the Office of Personnel Management (OPM).

[2] 5 U.S.C. § 3321 (1982); 5 C.F.R. §§ 315.801-315.909 (1983). The statute gives the President authority to provide by regulation etc. for a period of probation. OPM regulations provide for a one-year probationary period.

[3] Horn v. United States, 419 (Ct. Cl. 1969) (probationary employees); Batchelor v. United States, 169 Ct. Cl. 180, *cert. denied*, 382 U.S. 870 (1965) (excepted service employees).

[4] *See* Walker v. United States, 744 F.2d 67 (10th Cir. 1984); *but cf.* Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979) and Paige v. Harris, 584 F.2d 178 (7th Cir. 1978).

Congress[5] or the Office of Personnel Management (OPM).[6] Therefore, agencies generally may summarily remove or take other adverse disciplinary actions against these employees without giving them any predecision procedural protections, and without the employees having any significant post-decision right to challenge the agency's action administratively or judicially. The recent Supreme Court decision in *Cleveland Board of Education v. Loudermill*,[7] while not directly addressing the rights of probationary and excepted service employees, could significantly alter this. This article will discuss the implications of this significant case for the Army attorney.

II. Background

A. Statutory Protections

As early as 1912 Congress established procedural protections for federal employees in connection with adverse personnel actions.[8] These protections generally provided for advance notice, an opportunity to reply, and a final written agency decision. Subsequent civil service regulations enlarged these rights somewhat by providing, *inter alia*, an opportunity to challenge the agency's action at a full post-decision, trial-type hearing.[9] These protections and rights were limited to competitive service employees who had completed their probationary period, typically one year of employment. Similar procedures have been carried over in the 1978 Civil Service Reform Act (Act)[10] and current OPM regulations.[11]

These procedural protections existed without serious challenge until the early 1970s. The seeds of a constitutional challenge to these procedures were found in two 1972 U.S. Supreme Court decisions, *Board of Regents v. Roth*[12] and *Perry v. Sindermann*.[13] The challenge itself came two years later in *Arnett v. Kennedy*.[14] Surprisingly, the serious challenge came from a competitive service, nonprobationary employee for whom the Act provided the broadest protections.

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[5] 5 U.S.C. §§ 7503, 7513 (1982) establish procedures for adverse disciplinary actions against employees. 5 U.S.C. §§ 7501, 7511 (1982) define "employee" for purposes of sections 7503 and 7513 as excluding probationary and excepted service employees (nonpreference eligibles).

[6] OPM does provide limited predecisional rights to probationary employees if removal is based on preemployment conduct. 5 C.F.R. § 315.805 (1983). OPM also grants all probationary employees limited post-decisional appeal rights to the Merit Systems Protection Board. 5 C.F.R. § 315.806 (1983). Further, OPM permits agencies to extend coverage of internal agency grievance procedures to excepted service employees and probationary employees, in limited circumstances. 5 C.F.R. § 771.206 (1983).

[7] 105 S. Ct. 1487 (1985).

[8] Lloyd-LaFollette Act, ch. 389, § 6, 37 Stat. 555 (1912), enacted as one section of the Post Office Department appropriation bill for fiscal year 1913.

[9] *See* 5 C.F.R. § 752.202(f) (1972).

[10] Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5 U.S.C.). Sections setting out current procedural requirements for disciplinary actions are 5 U.S.C. §§ 7503, 7513 (1982).

[11] 5 C.F.R. §§ 752.401–752.406 (1983).

[12] 408 U.S. 564 (1972).

[13] 408 U.S. 593 (1972).

[14] 416 U.S. 134 (1974).

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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-ZA

29 April 1985

SUBJECT: Administrative Support for Trial Judges - Policy Letter 85-2

ALL STAFF JUDGE ADVOCATES AND MILITARY JUDGES

1. This letter reemphasizes and explains the policy in AR 27-10, paragraph 8-7b(5), concerning clerical support for trial judges.

2. Full-time enlisted clerks (MOS 71D) from assets managed by MILPERCEN are to be assigned to Trial Judiciary such that one enlisted clerk will perform duties at the Office of the Chief Trial Judge and one enlisted clerk will perform duties for each chief circuit military judge. Additionally, installation staff judge advocates will provide clerical assistance to other military judges as required. Experience has demonstrated that this combination of assigned full-time clerks and assistance from installation SJA's is the most effective and efficient means of supporting trial judges.

Hugh J. Clausen
HUGH J. CLAUSEN
Major General, USA
The Judge Advocate General

B. Impact of Roth *and* Perry

The Court in *Roth* and *Perry* determined that if public employees can demonstrate a legitimate claim of entitlement and expectancy in continued employment absent cause, they have a property right in their jobs protected by the due process clause of the fourteenth amendment to the U.S. Constitution.[15] Such an expectancy in continued public employment is based most frequently on a state or federal statute, but may also be created by other "rules or mutually expicit understanding,"[16] including contract provisions and past practice.

Roth went on to say that when a property right is implicated, the person to be adversely affected is entitled to "some kind of *prior* hearing."[17] it was this idea of a *prior* hearing that formed the basis for a later challenge to the federal civil service rules governing serious adverse personal actions.

C. Direct Constitutional Challenge to Federal Procedures—Arnett v. Kennedy

In 1974 the U.S. Supreme court was called upon to decide whether the procedures for dismissal of nonprobationary, competitive service employees established under the Lloyd-LaFollette Act[18] and its implementing regulations met procedural due process requirements.[19]

In *Arnett v. Kennedy*,[20] a nonprobationary, competitive service employee who had been removed from his job under these procedures, asserted, based on *Roth* and *Perry*, that these procedures were constitutionally deficient. The employee first argued that he had a property right in his job because as a nonprobationary, competitive service employee he could be removed only for "such cause as will promote the efficiency of the service."[21] The Court recognized that the employee had a statutorily-based expectancy in continued employment absent good cause and, thus, had a property right protected by the fifth amendment.[22]

The employee then argued, based on the Court's decision in *Roth*, that he was entitled to a hearing prior to his removal. Procedures then in existence, similar to those in force now, provided for advance written notice, an opportunity to reply orally and in writing, a right to see the evidence upon which the agency's decision was based, a final written agency decision prior to the effective date of the action, and an administrative appeal (which included a full trial-type hearing) after the action. These procedures did not, however, provide for a full trial-type hearing prior to the adverse action.

The Court found that a property right existed, but upheld the constitutionality of the procedures then in force. There was no majority opinion explaining the basis for the Court's decision. The plurality reasoned that Congress in granting a property right in a job could and did at the same time define and condition that right to encompass only certain enumerated procedural protections.[23] "Therefore, the employee had to take the "bitter with the sweet."[24] This "bitter with the sweet" approach sanctions very minimal due process.

D. The Problem

There is support for the proposition that the Civil Service Reform Act of 1978, as interpreted by the Merit Systems Protection Board (MSPB),[25] creates a property right in continued employment for probationary and excepted service employees. Because the procedural protections offered to these employees in connection with adverse disciplinary actions are extremely limited, the constitutionality of these procedural

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[15] *Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 601.

[16] *Perry*, 408 U.S. at 601. *See Ashton* and *Paige*.

[17] *Roth*, 408 U.S. at 570 [emphasis added].

[18] *See supra* note 8 and accompanying text.

[19] *Arnett*, 416 U.S. at 147–48.

[20] 416 U.S. 134 (1974).

[21] *Id.* at 151–52 (quoting from 5 U.S.C. § 7501 (1970)).

[22] *Id.*

[23] *Id.* at 152–54, 163 (plurality opinion by Rehnquist, J., joined by Burger, C.J., and Stewart, J.).

[24] *Id.* at 154.

[25] 5 U.S.C. §§ 1201–1203, 1205 (1982). The independent executive body was created by the 1978 Civil Service Reform primarily to hear and adjudicate disputes between employees and Federal agencies. This function was performed previously by the Civil Service Commission.

protections may depend on acceptance of the "bitter with the sweet" approach of the plurality in *Arnett*. However, the Supreme Court in *Cleveland School Board v. Loudermill* appears to have expressly rejected the "bitter with the sweet" approach to public employee rights.[26] What follows is an examination of this potential problem.

III. Statutory Rights of Probationary and Excepted Service Employees—Due Process Requirements

A. The Civil Service Reform Act of 1978

This Act established, in connection with serious adverse personnel actions, elaborate predecision procedural protections,[27] an administrative appeal right to the MSPB,[28] and a right to judicial review of the MSPB decision.[29] These protections generally are available only to competitive service employees who have completed their one-year probationary period.[30]

Congress did, however, provide some protection to all employees, including probationary and excepted service employees, in a set of broad-based merit principles which guide all personnel management.[31] Generally, these principles provide that a personnel action should be based solely on an employee's performance, ability, conduct, and like factors; and, that employees should be protected from actions based on some reason other than merit.

These lofty ideals were embodied in a set of prohibited personnel practices[32] which prohibit the taking of any personnel action for reasons such as:

1. Discrimination because of race, color, religion, sex, national origin, age, or handicapping condition;[33]

2. Reprisal for the employee's blowing the whistle on agency fraud, waste, or abuse;[34]

3. Reprisal for exercising any appeal or grievance rights; or[35]

4. "Conduct which does not adversely affect the performance of the employee or applicant or the performance of others."[36]

In addition to whatever rights employees have in connection with adverse actions, employees who are victims of a prohibited personnel practice may complain to the Office of Special Counsel.[37] The Special Counsel may, at his discretion, seek corrective action and administratively prosecute officials who commit prohibited personnel practices.[38] Thus, probationary employees and excepted service employees were given this limited statutory protection by the Act in an adverse action context.

B. The Prohibited Personnel Practices—A Property Right for Probationary and Excepted Service Employees?

In *Merritt v. Dep't of Justice*,[39] the MSPB, for the first time since its creation, reviewed the substantive requirement that serious disciplinary actions against nonprobationary, competitive service employees be taken only for "such cause as will promote the efficiency of the service."[40] The central issue was the extent to which misconduct, forming the basis for disciplinary action,

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[26] 105 S. Ct. at 1492–93.

[27] 5 U.S.C. §§ 7503, 7513 (1982).

[28] 5 U.S.C. § 7701 (1982).

[29] 5 U.S.C.A. § 7703 (West 1980 & Supp. 1985). Judicial review of serious disciplinary actions is direct from the MSPB to the U.S. Court of Appeals for the Federal Circuit.

[30] Procedural safeguards provided by 5 U.S.C. § 7513 (1982) apply also to excepted service employees who are preference eligibles.

[31] 5 U.S.C. § 2301 (1982).

[32] 5 U.S.C. § 2302 (1982).

[33] *Id.* § 2302(b)(1).

[34] *Id.* § 2302(b)(8).

[35] *Id.* § 2302(b)(9).

[36] *Id.* § 2302(b)(10).

[37] 5 U.S.C. §§ 1204–1206 (1982). The Office of Special Counsel is a new creation of the 1978 Civil Service Reform Act. The Special Counsel is described by some as an ombudsman and by others as a prosecutor.

[38] 5 U.S.C. § 1206 (1982).

[39] MSPB Docket No. PH 075209058 (June 8, 1981).

[40] 5 U.S.C. §§ 7503(a), 7513(a) (1982). Both sections permit disciplinary action only "for such cause as will promote the efficiency of the service." This "cause" standard existed prior to the Civil Service Reform Act.

had to be job-related to satisfy the "cause" standard. Merritt argued that the action of the Act which makes it a prohibited personnel practice to take a personnel action on the basis of conduct that does not adversely affect the performance of the employee or the performance of others, supplements the "cause" standard and thus permits disciplinary action only for job-related misconduct.[41] In asserting that this prohibited personnel practice had no effect on the long standing "cause" standard as it historically had been interpreted by the courts prior to the Civil Service Reform Act, both the Department of Justice and the Office of Personnel Management argued that the only effect of that prohibited personnel practice was to extend the protection of the "cause" requirement to all categories of employees and actions listed in 5 U.S.C. § 2302(a)(2),[42] Section 2302(a)(2) includes adverse personnel actions taken against probationary and excepted service employees.[43] The board concluded that the prohibited personnel practice did at least that much on its face; that is, it extended the "cause" standard to probationary and excepted service employees.[44]

Recalling *Roth*, *Perry*, and *Arnett*, such a "cause" requirement creates a property right: a statutorily-based expectancy in continued employment absent cause. Accordingly, the MSPB interpretation appears to create a property right for probationary and excepted service employees. If such a property right is created, we must consider next whether the procedural protections currently afforded these employees meet the requirements of due process.

C. Procedural Protections and Due Process

The various procedural protections given to probationary and excepted service employees were discussed earlier.[45] They can complain to the Office of Special Counsel about prohibited personnel practices.[46] However, the Special Counsel is not required to seek corrective action or take any other action on behalf of the complaining employee other than to conduct a preliminary inquiry to determine whether to pursue the matter.[47]

Most cases which have considered the limited rights of probationary and excepted service employees have not discussed the property right and due process requirements, but rather have focused almost entirely on the statutory provisions.[48] This probably reflects the generally held belief that these employees usually have no property right in continued employment.[49] The closest discussion of what might be termed a property right given these employees by statute is *Borrell v. Int'l Communications Agency*, where the U.S. Court of Appeals for the D.C. Circuit stated:

> Although Congress sought to safeguard all employees, both tenured and non-tenured, from prohibited personnel practices and thereby to ensure a 'more effective civil service' for the public generally, it established in the Act a detailed enforcement scheme to affect its purpose. That scheme allows probationary employees such as appellant relief only through investigation and corrective action by the OSC.[50]

To the extent that *Borrell* was addressing a property right when it accepted the limited protections for probationary employees, it appears to have adopted the "bitter with the sweet" approach from *Arnett* which has since been rejected by the Supreme Court in *Loudermill*.

Therefore, case law to date which has upheld the procedural protections given to probationary and excepted service employees seems to be of little help in evaluating whether these procedural protections will meet constitutional standards if a

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[41] *Merritt*, at 13–18. The prohibited personnel practice at issue is at 5 U.S.C. § 2302(b)(10) (1982).

[42] *Id.* at 14.

[43] *See* Frazier v. MSPB, 672 F.2d 150 (D.C. Cir. 1982); Wren v. MSPB, 681 F.2d 867 (D.C. Cir. 1982); Borrell v. U.S. Int'l Communications Agency, 682 F.2d 981 (D.C. Cir. 1982).

[44] MSPB Docket No. PH 075209058, at 14. The prohibited personnel practice at issue is at 5 U.S.C. § 2302(b)(10) (1982).

[45] *See supra* nn. 8–22.

[46] 5 U.S.C. § 1206(a)(1) (1982).

[47] *Id. See Wren*, 681 F.2d at 873–4.

[48] *See Borrell; Wren.*

[49] *See* Walker v. United States, 744 F.2d 67 (10th Cir. 1984).

[50] *Borrell*, 682 F.2d at 987.

property right is found in the wake of *Loudermill.*

IV. Impact of *Cleveland Board of Education v. Loudermill*

The Supreme Court, in *Cleveland Board of Education v. Loudermill,* considered what type of pretermination due process must be given a public employee who can be discharged only for cause.[51] While the case concerned a state employee, the opinion clearly impacts on all public employees.

Loudermill, a nonprobationary security guard for the Cleveland Board of Education, was fired for lying on his employment application. Under state law he had a post-decision appeal right, but no predecision opportunity to respond to the charges underlying his firing. The Court concluded that because he had a property interest in continued employment, he was entitled to some "opportunity to present his side of the story"[52] prior to his firing. Of greatest importance to federal civilian employees is the Court's discussion of what creates a property right in employment, what procedural protections afford due process, and the status of the "bitter with the sweet" approach to employee rights.

A. Property Right

The Court reaffirmed the proposition that a statutory provision entitling an employee to retain his job absent "cause" creates a justified expectancy in continued employment, and thus esablishes a property right protected by the due process guarantees of the Constitution.[53] To that extent, the Court does not depart from *Roth, Perry,* and *Arnett.* Therefore, if, as suggested by the MSPB in *Merritt,* the prohibited personnel practice in 5 U.S.C. § 2302(b)(10) extends a "cause" requirement to all employees and personnel actions listed in 5 U.S.C. § 2302(a)(2), then removal of a probationary or excepted service employee may only be for cause and a property right is implicated by such an action.

[51] 105 S. Ct. at 1490.

[52] *Id.* at 1495.

[53] *Id.* at 1491–92.

B. Due Process Requirements for Nonprobationary Competitive Service Employees

The Court also reaffirmed its holding in *Arnett* that the existing procedural protections afforded nonprobationary, competitive service employees meet constitutional requirements.[54] Thus, there is still no need to provide these employees a formal trial-type hearing before terminating their employment. The advance written notice, right to reply orally and in writing, right to a final written agency decision, and the right to challenge the decision at a trial-type hearing after the fact continue to satisfy constitutional due process requirements.

C. Right of Probationary Employees and Excepted Service Employees

The significance of the court's decision in *Loudermill* for these employees is the Court's express rejection of the "bitter with the sweet" approach of the plurality opinion in *Arnett v. Kennedy.*[55] The Court, adopting the rationale of Justice Powell's concurring opinion in *Arnett,*[56] concluded that the legislature may confer a property interest public employment (it does not have to), but once it does, the Constitution, not the legislature, defines the scope of the right and the due process requirements.[57]

The potential impact of this holding in *Loudermill* on probationary and excepted service employee rights is significant. If the prohibited personnel practice in 5 U.S.C. § 2302(b)(10) does create a property right by its "cause" requirement, then the very limited procedural protections offered these employees must meet constitutional due process requirements. We must return to *Roth* as a starting point for evaluating whether these procedures meet constitutional standards.

D. Due Process Requirements

In *Roth* the Court noted that the principles of due process require "some kind of prior hearing"

[54] *Id.* at 1493.

[55] *Id.*

[56] *Arnett,* 416 U.S. at 167.

[57] *Loudermill,* 105 S. Ct. at 1493.

to remove an employee who has a constitutionally protected interest in continued employment.[58] While the Court recognized that the pretermination hearing need not be elaborate, the precise dimensions are determined by two factors: the importance of the interests involved and the nature of the subsequent proceedings available to challenge the action.[59]

The nature of the property interest involved is different for a probationary employee than it is for an excepted service employee who is beyond the first year of employment. The purpose of a probationary period reasonably justifies less procedural due process to avoid undue administrative burden on the employer during this trial period. An excepted service employee beyond the first year of employment, however, differs very little from a competitive, nonprobationary employee who is entitled to the full array of due process protections. Minimum due process would appear to suffice for the probationary employee, whereas something more may be required for the excepted service employee after the first year of employment.

The other important factor concerns the nature of subsequent proceedings available to challenge the action. Courts have consistently found that both probationary and excepted service employees normally have no right to appeal their adverse personnel actions to the MSPB, a right enjoyed by nonprobationary, competitive service employees facing serious adverse actions.[60] The courts also have consistently denied those employees the right to challenge these personnel actions in court, another right granted by statute to nonprobationary, competitive service employees.[61] The virtual complete absence of any post-decision vehicle for these employees to challenge their removal, militates in favor of more than minimum due process protections before the action, if a property right exists.

Judicial guidance concerning what might constitute adequate due process for these employees is limited. Two significant cases found a property right for excepted service employees based on language in agency handbooks and other written communications from the agency to the employee. In one of these cases, *Paige v. Harris*,[62] the 7th Circuit held that the employee was entitled to a hearing in which he could challenge the sufficiency of the charges. While the nature of that hearing was not discussed, the court did conclude that an administrative hearing would be a futile gesture because of the extensive controversy in the case, and that the employee should get a trial in federal district court.[63] In the second case, *Ashton v. Civiletti*, the D.C. Circuit simply noted that terminating an employee with a property right must be "proceded by a due process hearing."[64]

Despite the lack of judicial guidance concerning how much due process might be required, minimum due process requires notice and an opportunity to respond. That, in itself, would be a change from current practice and a significant increase in procedural protections for probationary and excepted service employees.

V. The Government's Rebuttal

Because of the Court's decision in *Loudermill*, it is critical that the government successfully rebut any suggestion that probationary or excepted service employees enjoy a property right in their jobs.

A. The Significance of Merritt

The only suggestion that the prohibited personnel practice in 5 U.S.C. § 2302(b)(10) creates a "cause" requirement applicable to probationary

[58] *Roth*, 408 U.S. at 570.

[59] Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

[60] Ralston v. Dep't of Army, 718 F.2d 390 (Fed. Cir. 1983) (excepted service employees—no appeal right to MSPB); Stern v. Dep't of Army, 699 F.2d 1312, 1314 (Fed. Cir. 1983) (probationary employee—no appeal right to MSPB). *But cf.* 5 C.F.R. § 315.806 (1983) wherein OPM grants probationary employees limited appeal right to MSPB.

[61] *See Borrell; Wren.*

[62] 584 F.2d 178 (7th Cir. 1978). The court found a property right for an excepted service employee based on a provision in the agency's handbook that suggested employment had some permanence. *Id.* at 181–2.

[63] *Id.* at 185.

[64] 613 F.2d 923 (D.C. Cir. 1979). The court found a property right for an excepted service employee based upon an agency handbook and a welcome letter suggesting that the employee's job was secure if he performed acceptably.

and excepted service employees is found in the MSPB's decision in *Merritt*.[65] Despite the deference likely to be given to the board's interpretation of the Civil Service Reform Act,[66] the board's comment in *Merritt* is clearly *dicta*. The board's comment was a passing one made while rejecting the Justice Department's and OPM's unsuccessful effort to limit the effect of 5 U.S.C. § 2302(b)(10) on the cause standard for nonprobationary, competitive service employees.[67] The exact scope of section 2302(b)(10), particulary with respect to probationary and excepted service employees, was not in issue and was not fully examined by the board.

A closer look at the Civil Service Reform Act in its entirety reveals that Congress could not have intended to create a property right for probationary and excepted service employees in section 2302(b)(10).

B. Impact of Other Civil Service Reform Act Provisions

Section 2302(b)(10) is one section in a comprehensive legislative package making up the Civil Service Reform Act of 1978. This one secton must be interpreted in such a way to give effect, if possible, to the entire Act.[68]

There can be little doubt that Congress explicitly created a property right in federal employment in some instances. In 5 U.S.C. § 7503 concerning suspensions for fourteen days or less, and in 5 U.S.C. § 7513 concerning more serious disciplinary actions, both of which apply to nonprobationary, competitive service employees,[69] Congress provided that an employee could be so disciplined only "for such cause as will promote the effiiency of the service." This language is identical to that previously found in 5 U.S.C. § 7501,[70] which the Supreme Court in *Arnett* found created a property right.[71] If Congress had intended to create a property right in federal employment for probationary or excepted service employees, it could have used this language in section 2302(b)(10). It did not.

Further, regarding probationary employees, since 1883 Congress has "authorized agencies to terminate summarily employees for unsatisfactory work performance or conduct during an initial period of their employment—the probationary term."[72] In fact, in 1978 when Congress reenacted 5 U.S.C. § 3321, which provides the Executive branch almost total control over probationary employees, Congress extended the scope of that section to provide a probationary period for supervisors.[73] This further indicates Congress' continuing support for the proposition that summary removal authority over probationary employees is essential to the effective and efficient operation of the civil service. This action by Congress is clearly inconsistent with any creation of a property right for probationary employees.

C. The Real Meaning of Section 2302(b)(10)

The language of section 2302 generally and in particular, section 2302(b)(10), its location within Title 5 of the U.S. Code, and its legislative history strongly suggest that it grants no right to any employee. Not only does section 2302(b)(10) not adopt the clear property right language from sections 7503 and 7513, the focus of section 2302(b)(10) is completely different. While the focus of section s 7503 and 7513 is solely on adverse actions and employee rights, the focus of section 2302(b)(10), as with 2302 generally, appears to be on controlling the conduct of agency officials, which control will enhance the effectiveness of agency management and protect the public's interest in an effective and efficient civil service.

This reading is supported by the section-by-section analysis of the Civil Service Reform Act.[74] Both the introductory paragraph to the

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[65] *See supra* note 39 and accompanying test.

[66] Borsari v. FAA, 699 F.2d 106, 112 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 115 (1984).

[67] The "cause" standard referred to is found at 5 U.S.C. §§ 7503(a) and 7513(a) (1982).

[68] American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490 (1981).

[69] *See* 5 U.S.C. §§ 7501, 7511 (1982).

[70] 5 U.S.C. § 7501 (1970).

[71] *Arnett*, 416 U.S. at 151–52.

[72] INS v. FLRA, 709 F.2d 724 (D.C. Cir. 1983).

[73] 5 U.S.C. § 3321(a)(2), (b) (1982).

[74] S. Rep. No. 969, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2739–45.

analysis of section 2302 generally, and the analysis of section 2302(b)(10) specifically, state that violations of these provisions subject the agency official to disciplinary action.[75] There is no mention of any new employee rights.

Even the analysis of section 2301, Merit System Principles, begins by emphasizing that for the first time the law places on federal agencies an affirmative mandate to adhere to merit principles.[76] This discussion also mentions nothing about any new employee rights.

Additionally, the U.S. Court of Appeals for the Second Circuit recently concluded that section 2302(b)(10) reflected Congress' intent to make the federal civil service more efficient and business-like by protecting agencies from management officials' decisions which are not motivated by the interests of the agency.[77] This court's examination of the legislative history of section 2302(b)(10) also reveals no creation of new employee rights.

Employees incidentally benefitting from congressional control of the behavior of agency officials does not equate to the grant of a property right. Were this otherwise, we could never, by statute, regulation, or policy, effectively regulate the conduct of our management officials in taking personnel actions without triggering the due process requirements for all our employees.

The placement of section 2302 apart from the adverse action provisions of Title 5 further supports this reading of section 2302. This interpretation of section 2302 is reasonable and it allows us to reconcile this section with other provisions of the Civil Service Reform Act.

VI. Conclusion

Probationary and excepted service employees have tried frequently through the courts and through Congress[78] to gain greater procedural rights in connection with serious disciplinary actions. While these efforts have been unsuccessful to date, the Court's decision in *Loudermill* gives these employees new ammunition for their fight.

Agency counsel should anticipate renewed efforts by these employees to seek expanded rights. While these efforts could be made in several forums, the only forum in which we should have to respond substantively to the due process issues is in federal court.[79] While involvement by installation attorneys in direct court actions is more limited than in MSPB appeals or arbitration cases, because greater responsibility is being delegated to installation attorneys to represent the Army's interests in court litigation, installation attorneys must be prepared to respond to this challenge.

Our response to anticipated efforts to expand procedural protections for probationary and excepted service employees in the wake of *Loudermill* should take the following approach:

1. The Civil Service Reform Act does not create a property right in federal employment for either of these employees; and
2. If a property right is found to exist, current procedures applicable to these employees satisfy due process requirements because of the limited nature of the interest involved.

Effective management of the civilian personnel system requires that probationary employees, serving a period of evaluation which is an extension of the hiring process, be subject to expeditious release unencumbered by detailed procedures. Similarly, excepted service employees have a special status requiring that management be able to take quick action regarding them. This article provides government arguments to maintain these important and fundamental government prerogatives.

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[75] *Id.* at 2742, 2744–45.

[76] *Id.* at 2741.

[77] Wild v. HUD, 692 F.2d 1129, 1132–33 (7th Cir. 1982).

[78] H.R. 917, 99th Cong., 1st Sess. (1985). This bill introduced on February 4, 1985, would extend to certain excepted service employees the full procedural and appeal rights currently afforded nonprobationary, competitive service employees.

[79] While the issue could be raised in an appeal to the MSPB, the board's jurisdiction is established and limited by statute. Even if significant due process protections were required for these employees, absent congressional action, that due process would not include an MSPB appeal right.

Recent Report of Survey Developments

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This article summarizes the major changes made by the newly revised report of survey regulation, AR 735–11, which was effective 15 May 1985.[1] In addition, the Appendix following the article summarizes a recent administrative law opinion pertaining to reports of survey.[2]

The primary purpose of this article is to update judge advocates[3] as to the major changes made by the new regulation. In addition, judge advocates should be able to use this article (and their experiences with reports of survey, including experiences with local problem areas) to more easily prepare for local commanders a fact sheet summarizing these major changes.[4] This discussion of the changes is arranged so the reader can see how the changes affect the different individuals involved with reports of survey. Since the format of the new AR 735–11 is changed substantially from that of its predecessor, a line-by-line comparison between the new AR 735–11 and the prior AR 735–11 is not practical.

I. Unit Commanders

TO&E unit commanders (and equivalent TDA commanders) are authorized to adjust losses of durable handtools up to $100 per incident, when the losses did not result from negligence or willful misconduct.[5] The intent of this provision is to simplify the procedures for relatively low dollar-value losses involving durable handtools. To make such an adjustment, the unit commander simply prepares a disposition form containing a narrative of the incident, a list of the handtools, and a statement that the unit commander found no evidence of negligence or misconduct.[6]

The unit commander will send a quarterly report summarizing such adjustments involving durable handtools to the report of survey appointing authority. If the appointing authority determines that there has been an abuse of this procedure, the appointing authority may require that an AR 15–6[7] investigation or a report of survey be initiated on any or all of the losses.

When a unit commander must initiate a report of survey has been changed. The first step for the unit commander is to determine whether an AR 15–6 investigation is required. Use of an AR 15–6 investigation is required when directed by other specific Army regulations, by a commander, or by a report of survey appointing

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[1] Dep't of Army, Reg. No. 735–11, Property Accountability—Accounting for Lost, Damaged, and Destroyed Property (1 May 1985) [hereinafter cited as AR 735–11] [contained in the Unit Supply UPDATE, published semiannually; the current issue is Issue No. 7, 1 May 1985]. All references herein are to the 1 May 1985 edition of AR 735–11 unless otherwise noted. For simplicity, references in the text to the 15 September 1981 edition of AR 735–11, which was superseded by the 1 May 1985 edition of AR 735–11, will be to the "prior AR 735–11."

[2] A summary of significant report of survey administrative law opinions is found in King, *Reports of Survey: A Practitioner's Guide*, The Army Lawyer, June 1984, at 1. The only significant report of survey administrative law opinion published since June 1984 is summarized in this article. Thus the reader need refer only to two *The Army Lawyer* articles to find the significant administrative law opinions pertaining to reports of survey.

[3] The term "judge advocate" is used for brevity and to include not only judge advocates, but also Department of the Army civilian attorneys who are involved with reports of survey.

[4] This writer suggests that such a fact sheet would be helpful to commanders and others involved with reports of survey. Preparation of such a fact sheet is a good preventive law measure and has the side benefit of generating goodwill for the staff judge advocate/legal office.

[5] AR 735–11, para. 2–2. Positions equivalent to that of a using unit commander are explained in AR 735–11, para. 2–2*b*. Unfortunately, there is no definition or explanation of "incident."

[6] *Id.* para. 2–2*a*. The statement reads, "I have reviewed the circumstances surrounding the loss of the above items and find no evidence of negligence or misconduct."

[7] Dep't of Army, Reg. No. 15–6, Boards, Commissions, and Committees—Procedure for Investigating Officers and Boards of Officers (24 Aug. 1977) [hereinafter cited as AR 15–6].

authority.[8] A report of survey or an AR 15–6 investigation[9] is required to account for lost, damaged, or destroyed government property anytime negligence or misconduct is suspected and liability is not admitted.[10] In addition, a report of survey or an AR 15–6 investigation is required in seven specified instances.[11] The only change here is that an accountable officer may make voluntary reimbursement for the full value of a loss discovered as a result of a change of accountable officer's inventory.[12] This change makes sense and precludes the mandatory requirement for a report of survey when an accountable officer admits liability and offers to pay for the loss. Thus a statement of charges or a cash collection voucher, for example, can now be used.

A third change that impacts at the unit level is that the provisions pertaining to relief from property responsibility have been modified, allowing the use of additional procedures, such as a collateral investigation used for aircraft accidents under AR 385–40[13] or an abandonment order issued per AR 735–11.[14]

II. Appointing Authorities

An important change affecting appointing authorities is that regardless of who initiates a report of survey, it will be processed through the property responsibility chain[15] of the individual responsible for the property at the time of the incident, if the individual is subject to AR 735–11.[16]

For example, SP4 Able from the supply and transport (S&T) battalion is assigned as the general's driver and draws a government sedan from the transportation motor pool (TMP). His negligence in driving the sedan proximately causes damage to the sedan. TMP personnel will initiate the report of survey, and the report of survey will go to the property book officer for TMP, who will pull a copy for his or her records and assign a document number. The question then is whether

[8] AR 735–11, para. 3–21. For example, Dep't of Army, Reg. No. 190–11, Military Police—Physical Security of Arms, Ammunition, and Explosives, paras. 7–2*a*(2)*(b)* and 7–5 require an AR 15–6 investigation for losses of sensitive items listed in appendix C of that regulation (such as handguns; riot control agents; the launcher, missile guidance set, or optical sight for the TOW; or a hand or rifle grenade). Appendix C sets out quanities for each item that trigger this requirement for an AR 15–6 investigation.

[9] An AR 15–6 investigation can be used anytime in lieu of a report of survey. AR 735–11, paras. 3–2*c* and 3–21*b*. The purpose of this provision is to avoid having two investigations, with a separate AR 15–6 investigating officer and a surveying officer, for one incident. Thus this allows the efficient use of personnel. This provision does not, however, eliminate the use of the report of survey form (DA Form 4697). AR 735–11, para. 3–21*b* states that when an AR 15–6 investigation "initiated in compliance with paragraph 3–2*b*(1) and (2) determines that Government property has been lost, damaged, or destroyed," then a DA Form 4697 is attached to the AR 15–6 investigation and prepared according to the instructions in AR 735–11, para. 3–21*b*(2). This should not be limited to only those AR 15–6 investigations initiated under AR 735–11, para. 3–2*b*(1) or (2), but should also include anytime an AR 15–6 investigating officer is used in lieu of a surveying officer and government property is found to be lost, damaged, or destroyed.

[10] AR 735–11, para. 3–2*a*. This subparagraph is inartfully drafted, and actually reads that a report of survey or an AR 15–6 investigation is required "anytime it is known that negligence or misconduct is suspected, and liability is not admitted." This should not be read by unit commanders to mean that they must "know" that negligence or misconduct is involved.

[11] *Id.* para. 3–2*b*. This list should not be read as an exhaustive list of when a report of survey is required. For example, this list should be read in conjunction with para. 2–13, which provides that when other specific means to account for lost, damaged, or destroyed government property and to obtain relief from property responsibility are not authorized, a report of survey will be initiated. In addition, this list should include an eighth requirement that when property settlement is required by the death, desertion (including absence without leave of unknown duration), or insanity of a person, a report of survey will be prepared for missing or damaged articles. *See* AR 735–11, para. 3–8*a*.

[12] *Id.* para. 3–2*b*(3).

[13] Dep't of Army, Reg. No. 385–40, Safety—Accident Reporting and Records (1 Sept. 1980).

[14] AR 735-11, para. 1–8*b*. Whereas previously AR 735–11, para. 1–5*b* (15 Sept. 1981) (superseded) provided that relief from property responsibility can be obtained only by the ten listed actions, AR 735–11, para. 1–8*b* does not purport to contain an exhaustive list.

[15] AR 735–11, para. 3–4*a*(1). Actually, this paragraph states that the report of survey will be processed through the responsible individual's "chain of command." More accurately, this should refer to the responsible individual's property responsibility chain, as does the text accompanying this footnote.

[16] *Id.* Formalized support agreements that provide for other processing are authorized and take precedence over this provision.

the report of survey should be processed by the TMP personnel or the S&T personnel. Whereas the prior AR 735–11 did not specify which chain processed the report of survey, AR 735–11 now specifies that SP4 Able's report of survey would be processed through the S&T property responsibility chain, *not* through the TMP chain.

III. Surveying Officers

AR 735–11 clarifies the policy concerning appointment of surveying officers and their responsibilities. The first change is that upon appointment as a surveying officer, "investigating the report of survey is that individual's primary duty until the appointing authority has accepted the investigation as completed."[17] This language is designed to ensure that surveying officers and others place proper emphasis on the surveying officer's responsibilities; this language does not state, however, that this will be the individual's only primary duty.

In addition, the surveying officer "will" be senior to the person subject to possible pecuniary liability, except when individuals senior to that person "are not within the available resources of the appointing authority."[18] The prior AR 735–11 provided that the surveying officer "should" be senior to that person.[19] That an individual must be within the appointing authority's "available resources" should be read to allow appointing authority to determine that certain individuals are not available because of mission requirements, even though the individuals are senior to the person subject to possible pecuniary liability and are physically present for duty. A suggested solution that avoids the undesirable situation of having the surveying officer junior to the person subject to possible pecuniary liability is for the appointing authority to go outside the unit and obtain a more senior surveying officer from another unit. This change has the salutary effect of tightening policy, while at the same time giving the commander necessary flexibility.

When is a member of the military senior to a Department of the Army civilian who is subject to possible pecuniary liability? While the prior AR 735–11 was silent on this point, AR 735–11 now provides[20] that to determine the grade equivalency of military versus civilian personnel, one refers to AR 640–3.[21]

AR 735–11 states that as a first priority, the surveying officer physically examines the damaged property and releases it for repair or disposal. This should be done on the first day of the surveying officer's appointment.[22]

The time periods for the surveying officer have been clarified. As before, the appointing authority has forty days to process a report of survey. AR 735–11 allots thirty of those days to the surveying officer,[23] and gives the remaining ten days to the appointing authority.

Also, under the prior AR 735–11, when a surveying officer discovered that the person recommended to be held pecuniarily liable was not "readily available," the surveying officer was required to mail certain information to the individual. If a reply was not received, or not "expected to be received within a reasonable time," the surveying officer was to process the report of survey "without further delay."[24] AR 735–11 now provides in this situation that if both the surveying officer and the individual are in the continen-

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[17] *Id.* para. 4–7*a*.

[18] *Id.* para. 4–7*b*(3).

[19] AR 735–11, para. 4–5*a* (15 Sept. 1981) (superseded).

[20] AR 735–11, para. 4–7*b*(3).

[21] Dep't of Army, Reg. No. 640–3, Personnel Records and Identification of Individuals—Identification Cards, Tags, and Badges, table 5–2 (17 Aug. 1984) provides the following equivalencies: E–7, E–8, E–9 = GS–6; W–1, W–2, O–1 = GS–7; W–3, W–4, O–2 = GS–8, GS–9; O–3 = GS–10, GS–11; O–4 = GS–12; O–5 = GS–13, GS–14; O–6 = GS–15; O–7, O–8 = GS–16, GS–17, GS–18. Although the table provides other equivalencies, they are not listed here, since AR 735–11 requires that an Army surveying officer be a sergeant first class or higher and that a Department of the Army civilian surveying officer be a GS–7 or higher.

[22] AR 735–11, para. 4–8*c*(4). AR 735–11, figure 4–3 contains a sample release statement.

[23] *Id.* para. 3–3*a*. Para. 3–3 states that reports of survey will be processed within 75 calendar days and that commanders "may adjust the time limitation downward at their discretion." Thus a commander can reduce the individual time periods of para. 3–3, including the surveying officer's 30 days, or else this provision would be meaningless. This should be read to apply only to the time limitations of para. 3–3; for example, this does not allow a commander to reduce the 15- or 30-day period of para. 4–11*a*(7).

[24] AR 735–11, para. 4–10*a* (15 Sept. 1981) (superseded).

tal United States (CONUS), the surveying officer must wait fifteen days from the time of mailing the required notice.[25] If either the surveying officer or the individual, but not both, is overseas, then the surveying officer must wait thirty days. Only after the fifteen or thirty days can the surveying officer continue processing the report of survey.

Faced with the above requirement to wait thirty days when the individual is overseas, as well as the requirement to process the report of survey within thirty days, what should the surveying officer do? A recommended solution is for the surveying officer to prepare a statement explaining the delay.[26] The surveying officer need not obtain approval by any higher authority for the delay.[27] The statement of delay will be attached to the report of survey.[28] The mandatory requirement to wait fifteen or thirty days takes precedence over the thirty days processing time given to the surveying officer and the overall seventy-five days processing time; AR 735–11 states that "[u]nder normal circumstances" the total processing time will not exceed seventy-five calendar days.[29] These processing times are not absolute and failure to comply with them normally will not form a basis for appeal by the individual held pecuniarily liable.[30]

IV. Approving Authorities[31]

The authority to act as an approving authority can be delegated down to the 0–6 level. Now, promotable 0–5s occupying such 0–6 positions are authorized to be approving authorities.[32] Previously that promotable 0–5 had to get an exception to AR 735–11 to act as an approving authority.

AR 735–11 now requires approving authorities to document their rationale when their decision is contrary to that of the appointing authority.[33] This change allows the Army to better explain or justify the approving authority's decision in the event that the individual petitions the Army Board for Correction of Military Records for relief.[34] In such instances, the record often will

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[25] AR 735–11, para. 4–11*a*(7). More precisely, this subparagraph provides that if a reply is not received within 15 days after the mailing for a CONUS address, or within 30 days for an OCONUS address, then the surveying officer will continue processing the report of survey. This provision was apparently written with a CONUS surveying officer in mind. It does not make sense to require a surveying officer in Germany, for example, to wait 15 days if the individual is in CONUS, but 30 days if the individual is in Germany. This author suggests using the interpretation given in the text accompanying this footnote.

[26] *See id.* para. 3–3. This paragraph provides that when a delay causes the processing times to be exceeded, the person responsible for the delay will prepare a written statement explaining the extenuating circumstances.

[27] There is no requirement in AR 735–11 for the person responsible for the delay to obtain advance approval for the delay.

[28] AR 735–11, para. 3–3.

[29] *Id.* para. 3–3*a*. Contrast this with the language of para. 3–3—the first sentence reads that a report of survey "*will* be initiated and processed within the time limits established below," and the fourth sentence reads that "[r]eports of survey *will* be initiated and processed within 75 calendar days . . ." (emphasis added). So what appears to be an absolute requirement is in fact not. Furthermore, para. 3–3*a* states that when received by the appointing authority, reports of survey "*will* be processed and presented to the approving authority not later than 55 calendar days after discovery of the discrepancy." (emphasis added). Yet the next sentence provides that the appointing authority "*should* complete his responsibility within 40 calendar days." (emphasis added). The apparent intent is to strongly encourage compliance with the processing time requirements, yet at the same time allow for unusual circumstances.

[30] That this will not normally provide a basis for appeal is not specifically included in AR 735–11.

[31] Although AR 735–11, chapter 4, section V is entitled "Approving Authority," chapters 4 and 5 refer to both the "approving" and the "approval" authority. This writer uses "approving" authority, since it appears to be the more frequently-used term in AR 735–11.

[32] AR 735–11, para. 4–20*a*.This change does not affect the 0–5 commander who actually exercises special court-martial convening authority, such as a separate battalion commander. Since that 0–5 is already a special court-martial convening authority, he or she automatically is an approving authority as long as his or her authority to convene special courts-martial has not been withheld.

[33] *Id.* para. 4-22*e*(4).

[34] A petition to the Army Board for Correction of Military Records is submitted pursuant to Dep't of Army, Reg. No. 15–185, Boards, Commissions, and Committees—Army Board for Correction of Military Records (18 May 1977). Note that AR 735–11, para. 5–6*b* states that "[f]ormer members and employees may appeal . . . under the provisions of AR 15–185." To the extent this implies that active duty service members and Department of the Army civilian employees cannot petition the Army Board for Correction of Military Records, it is incorrect. In addition, AR 735–11, para. 5–1*c*

contain a surveying officer's and appointing authority's recommendations against holding an individual liable, the individual's statement to the approving authority, and the individual's petition to the Army Board for Correction of Military Records—and there is nothing in the file to explain the approving authority's decision. In addition, to the extent this requirement causes approving authorities to articulate the basis for their decision, thus causing them to look more closely at the file and reach a better-reasoned decision, it is warranted. The drafters have struck a reasonable balance between requiring written justification in each case, which would impose a significant administrative burden, and not requiring any justification, which fails to protect the government's interests in the "problem cases" that are likely to result in challenges.

A third change affects approving authorities when they act contrary to the recommendations of the surveying officer and of the appointed authority, and find that pecuniary liability should be assessed. In this situation, approving authorities are required to ensure that the rights of the concerned individuals are protected.[35] In addition, approving authorities will state the rationale for the new decision on the report of survey form.[36]

Appeals are still processed through approving authorities, who, when not granting the appeal in full, still must prepare a memorandum that "will give the basis for denying the requested relief."[37] Approving authorities must now personally sign the memorandum; this will not be delegated.[38]

AR 735–11 keeps the twenty-day processing time goal for approving authorities, but adds that this includes the time required for a legal review.[39]

V. Individuals Held Pecuniarily Liable

AR 735–11 authorizes the involuntary withholding from the current pay of officers for an indebtedness resulting from a report of survey.[40] This implements a change to the general statutory authority for withholding money from the current pay of individuals, 37 U.S.C. § 1007, which, until its amendment in October 1984,[41] authorized such involuntary withholding from the current pay only of enlisted personnel in the Army and Air Force. The statute now authorizes such involuntary withholding from the current pay of "a member of the armed forces."[42] Therefore, the rule for Department of the Army civilians remains unchanged—such involuntary withholding is not authorized under either 37 U.S.C. § 1007 or AR 735–11.[43]

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states that the three listed procedures "are the sole procedures for seeking relief from pecuniary liability established according to this regulation [AR 735–11]." Inexplicably, no mention is made of submission of a petition to the Army Board for Correction of Military Records.

[35] AR 735–11, para. 4–22*e*(2). Specifically, the individual must be informed by letter through the appointing authority of the new decision and of any new evidence or rationale considered by the approving authority. (Actually, AR 735–11 says the individual "must be informed of any new evidence or rationale causing the difference in the new decision versus the recommendation." This should be read broadly, so as to require notification anytime new evidence is used by the approving authority, even if the new evidence did not "cause" a new decision.) The individual must be afforded the opportunity to seek legal counsel and to make a written statement. All actions required by AR 735–11, para. 4–11 must be taken. *Id.* para. 4–22*e*(3) and (4).

[36] *Id.* para. 4-22*e*(4) requires that the approving authority's rationale will be stated on Dep't of Army, Form No. 4697, block 37.

[37] AR 735–11, para. 5–7*g*(1)(*b*). Contrast this with the language of the prior AR 735–11, para. 5–5*f* that the approving authority memorandum "will set forth fully the basis for denying the requested relief."

[38] AR 735–11, para. 5–7*g*(3).

[39] *Id.* para. 3–3*a*.

[40] *Id.* para. 4–26*b*(2) provides that "[c]harges may be entered in the member's pay account without the consent of the officer concerned." As of this writing, the Dep't of Defense Pay Manual, para. 70702a and table 7–7–3 (1 Jan. 1967) still do not provide for such involuntary withholding from the current pay of an officer. Nonetheless, this writer concludes that such involuntary withholding is now authorized.

[41] DOD Authorization Act, 1985, Pub. L. No. 98–525, § 1305, 98 Stat. 2492, 2613 (1984).

[42] 37 U.S.C.A. § 1007(b) (West Supp. 1985). AR 735–11, para. 4–26*b* is misleading in that it cites 37 U.S.C. § 1007(e) and (f) as authority for involuntary withholding, but fails to mention § 1007(b).

[43] *See* AR 735–11, para. 4–26c. The legislative history of the DOD Authorization Act does not explain why 37 U.S.C. § 1007(b) was not amended to include DOD civilians. *See, e.g.*, H. Conf. Rep. No. 1080, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 4258.

A potential change that did not appear in the revised AR 735 11 involves collection for loss to government-provided quarters or furnishings. AR 735–11 does not include such losses in the circumstances that an individual must pay the full amount of the loss, rather than only one month's basic pay,[44] despite the fact that the wording of 10 U.S.C. § 2775 appears to require the collection of the full value of such loss.[45]

VI. Conclusion

In summary, although the wording sometimes lacks precision, the changes to AR 735–11 are well-thought out refinements that should clarify and improve the use and processing of reports of survey and other methods of obtaining relief from property responsibility.

Appendix
Summary of Recent Significant Report of Survey Administrative Law Opinions

DAJA–AL 1984/1725, 14 May 1984. Federal Drivers Act inapplicable to the report of survey system.

Background: A major command staff judge advocate (SJA) asked whether the Federal Drivers Act, 28 U.S.C. § 2679(b), applies to the provisions of AR 735–11. The SJA felt that the Federal Drivers Act (the Act) does not prevent the imposition of pecuniary liability under AR 735–11.

NOTE: 28 U.S.C. § 2679(b) reads:

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

Digest: The Judge Advocate General agreed with the SJA (see below) and concluded that no revision of Army regulations is required. The Judge Advocate General perceived the two statutory provisions to be mutually exclusive and capable of being implemented consistently.

In his request for opinion, the SJA reasoned that first, the Act provides that in suits against the United States for damages resulting from the negligent operation of a motor vehicle, the injured third party may not bring suit against the individual government employee responsible for the accident. Federal courts have upheld this principle. Although the Act does provide for the government to assume financial responsibility for such negligent acts, it does not specifically preclude collection from the government employee for damages to government property resulting from the negligent operation of a vehicle. Second, specific authority for the Army to collect for losses to its property under AR 735–11 is found in 10 U.S.C. § 4835. This statute was not amended either during or after the passage of the Federal Drivers Act, nor have any court opinions prohibited its application to employees negligently operating a motor vehicle.

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[44] AR 735–11, para. 4–18*b* provides for the collection of the full value of the loss only in three circumstances: loss of personal arms or equipment (only by military members), loss of public funds, and loss by an accountable officer.

[45] 10 U.S.C. § 2775 (1982). AR 735–11, para. 4–18*b*(3) in fact references 37 U.S.C. § 1007(f) when stating that accountable officers will be held pecuniarily liable for the full value of the loss. Despite the fact that the wording of 10 U.S.C. § 2775 is similar to that of 37 U.S.C. § 1007(f), the Army does not require collection for the full value of the loss of government-provided quarters or furnishings.

Claims Commissions in USAREUR: The Price of Friendship

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Introduction

Claims resulting from drunken brawls, criminal assaults, motor vehicle accidents, and other "nonscope" claims can be compensable under the Foreign Claims Act.[1] During Fiscal Year 1984, 732 claims were adjudicated under this Act by the U.S. Army Claims Service, Europe (USACSEUR). Of this number, 473 claims were approved in amounts totalling $286,692.[2] While precise figures are not available, approximately 60% of the claims filed involved acts of vandalism; 20% involved assault, including sexual attacks; and approximately 12% resulted from traffic accidents.

Relatively few judge advocates have experience in processing nonscope claims because this responsibility generally has been centralized.[3] Greater familiarity with this process is important because this claims function could be decentralized during wartime.[4] The purpose of this article is to familiarize judge advocates with the general procedures associated with processing these claims within USAREUR and to describe some recent substantive and procedural issues which have developed. Although these issues are discussed critically, the discussion will demonstrate that nonscope claims present intriguing legal issues. Some suggestions for change in processing nonscope claims are also presented. For the most part, these suggestions are being implemented by USACSEUR.

Background

Nonscope claims are those claims for personal injury, property damage, or wrongful death which result from tortious acts or omissions by U.S. service members or most civilian employees of the U.S. while acting beyond the scope of official duties.[5] Scope claims, as distinguished from nonscope claims, include claims for personal injury, property damage, or wrongful death arising from tortious acts or omissions by service members or most government employees while acting in the performance of official duties.[6] Because Article VIII of the NATO Status of Forces Agreement distinguishes "scope" and "nonscope" claims by prescribing different methods of adjudication and payment, and because the Army exercises single-service responsibility for certain NATO countries, claims commissions in USAREUR adjudicate only "nonscope" claims

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* The views expressed in this article are those of the author and do not necessarily reflect those of the U.S. Army claims Service.

[1] 10 U.S.C. § 2734 (1982) (as amended by Pub. L. No. 98-564, 98 Stat. 2918 (1984)).

[2] This total is deceptively small because tort judgments in the Federal Republic of Germany are significantly lower than corresponding U.S. claims. For example, in Susanne Hacks' authoritative compilation of German court decisions, only four cases are reported during 1974–1981 concerning awards for rape. Recoveries in these cases ranged from DM 4,000 to DM 8,000. Although many more claims of this nature are filed each year with USACSEUR, the highest amount awarded by USACSEUR has been DM 30,000.

[3] Dep't of Army, Reg. No. 27-20, Claims, para. 10-14 (C17, 15 Aug. 1981) [hereinafter cited as AR 27-20].

[4] AR 27-20, paras. 1-3, 10-14.

[5] The NATO Status of Forces Agreement art. VIII, para. 6, provides that the obligation to consider nonscope claims arises only from tortious acts or omissions caused by military members of the force or the civilian component. The Foreign Claims Act, implemented by AR 27-20, chapter 10, is considerably less restrictive. For example, acts or omissions caused by employees of nonappropriated fund instrumentalities are compensable even though such employees are not considered members of the civilian component of the force. AR 27-20, para. 10-2*d*. Despite these more expansive provisions, claims resulting from acts or omissions by local national employees and dependents are still excluded.

[6] Scope claims involve two major categories: claims for maneuver damage and claims for tortious conduct. Liability for maneuver damage is not based on fault. Whether a tank commander was negligent in damaging a farmer's field is irrelevant in determining liability for maneuver damage. Liability generally is based instead on a determination that U.S. personnel caused the damage. Scope claims for tortious conduct involve traditional concepts of fault. During FY 84, 27,507 maneuver damage claims and 8,420 tort claims were processed by USACSEUR.

arising in Belgium, France, and the Federal Republic of Germany.[7] Absent similar limitations, claims commissions operating elsewhere are authorized by regulation to consider both scope and nonscope claims.

Authorization to pay nonscope claims is provided by the Foreign Claims Act, as implemented by chapter 10 of AR 27–20.[8] Because nonscope claims result from acts or omissions beyond the scope of official duties, the familiar tort doctrine of *respondent superior* does not apply. Awards are ex gratia (out of grace), for there is no legal obligation to pay nonscope claims under either the Foreign Claims Act or the NATO Status of Forces Agreement. Policy considerations rather than legal obligations provide the basis for payment of nonscope claims.

Only inhabitants of a foreign country are eligible claimants.[9] Inhabitants of the U.S., such as U.S. service members and government employees, their dependents, and American tourists, are excluded.[10] Claims may be presented to either specified U.S. authorities or receiving state representatives. Within the Federal Republic of Germany, regional representatives are located in Defense Costs Offices (DCO). After a claim has been filed, USACSEUR determines whether the incident resulted from scope or nonscope activites by military members or the civilian component.

Scope claims generally are returned to the DCO for adjudication and payment of the claim. As provided by the NATO Status of Forces Agreement and the German-American Administrative Agreement,[11] the U.S. reimburses the sending state by paying its proportionate share, which usually is 75% of the amount approved.[12] Nonscope claims are also returned to the DCO. However, the DCO only investigates the claim and submits the claims file and a report to U.S. authorities. No payment of a nonscope claim is made by the DCO. Absent payment by the tortfeasor under Article 139 of the UCMJ[13] or a judgment by a court of competent jurisdiction in the receiving state,[14] the entire award is paid using appropriated funds of the United States.

Claims commissions are vested with broad authority. Members are designated by appointment; within USAREUR they are appointed by the Commander, USACSEUR, acting under a delegation of authority from the Commander, USAREUR and Seventh Army. Depending on the amount of the claim, nonscope claims are adjudicated by either a one-member or three-member claims commission. One member commissions generally are authorized to settle claims not exceeding $5,000.[15] Three member commissions may approve claims not exceeding $50,000 and may disapprove claims presented in any

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[7] AR 27–20, para. 10–22*b* (C18, 15 June 1984).

[8] 10 U.S.C. § 2734 (1982). A recent amendment to increase the payment authority of various officials was enacted by Pub. L. No. 98–564, 98 Stat. 2918 (1984) which has been implemented by Interim Change No. 1 to AR 27–20, dated 4 Mar. 1985.

[9] AR 27–20, para. 10–8*a*(1) (C18, 15 June 1984).

[10] *Id.* para. 10–8*b*.

[11] Administrative Agreement pursuant to Art. VIII of the NATO Status of Forces Agreement, effective 1 July 1963 [hereinafter cited as Administrative Agreement]. Only the Federal Republic of Germany and the United States are parties to this Administrative Agreement. Similar agreements have not been concluded by the U.S. with either Belgium or France. As a result, claims procedures which are routine in Germany are handled on an *ad hoc* basis in these other countries. Such matters are part of the unique mission of USACSEUR's branch office in Brussels, Belgium.

[12] NATO Status of Forces Agreement art. VIII, para. 5(e), and Administrative Agreement part B, § 1, no. 30. During FY 84, the U.S. share of maneuver damage claims totalled $23,776,611.84 and $7,017,321.16 for tort claims.

[13] Under the general philosophy that service members should pay their just debts, voluntary restitution has been encouraged by USACSEUR under the provisions of AR 27–20, para. 9–8*b* (C18, 15 June 1984) which implements Uniform Code of Military Justice art. 139, 10 U.S.C. § 939 (1982) [hereinafter cited as UCMJ].

[14] NATO Status of Forces Agreement art VIII, para. 6(d), provides that submission of a nonscope claim does not divest courts in the receiving state of their jurisdiction "unless and until there has been payment in full satisfaction of the claim." In practice, the process of investigating and adjudicating a nonscope claim stops upon receipt of a notice of suit by the claimant against the tortfeasor. If a claim has not been filed, instituting a suit does not toll the two-year statute of limitations. Paradoxically, once a claim has been filed, no rules define when a claim has been abandoned. Dilatory claimants are able to revive claims which were closed administratively for such reasons as a claimant's failure to submit required information.

[15] AR 27–20, para 10–19a (I01, 4 Mar. 1985).

amount.[16] Claims approved in excess of $50,000 must be confirmed by The Judge Advocate General, and the Secretary of the Army must confirm claims approved in excess of $100,000[17] Although decisions by claims commissions are not subject to appeal, requests for reconsideration are permitted by regulation.[18] Occasionally, dissatisfied claimants have sought judicial relief, but these attempts have been unsuccessful because there is no legal obligation to pay *ex gratia* claims.

Procedural Issues

Substantial delay in settling and paying nonscope claims has been a major problem.[19] The bulk of this delay is attributable to the investigation of claims by the DCO.[20] Ironically, the Status of Forces Agreement requires the sending state to decide "without delay" whether to offer an *ex gratia* payment, but no corresponding provision applies to the investigation by the receiving state.[21] Because nonscope claims are paid entirely by the sending state, there is no monetary incentive for the receiving state to investigate in a timely manner. Whether the DCO offices are at fault is not as important as recognizing that delay exists. Unfortunately, this delay frustrates the express purpose of the Foreign Claims Act: "[t]o promote and maintain friendly relations through the prompt settlement of meritorious claims. . . ."[22] Although automation could enable USACSEUR to monitor the status of claims under investigation by various receiving state officials, the process of coordinating with these offices still would be time-consuming.

Implementing a system of *solatia* payments could be another way of fulfilling the statute's aim of prompt settlement of claims. This system is described by AR 27–20, para. 13–2, as a nominal payment to the victim or family which is made without regard to legal liability. Although *solatia* payments are customary in the Orient, this practice has not been adopted in Western Europe. Its most attractive feature is that immediate payment can be made. As a tangible expression of regret, it may assuage feelings of hostility that a larger sum much later could not. Although *solatia* payments are not made in settlement of claims, this amount may be taken into account in determining any subsequent award.[23]

An important feature of *solatia* payments is that use of unit claims officers to make such payments would provide an opportunity for greater participation by the chain of command in the claims process. This might also result in the availability of more information about claims incidents in the event of a subsequent claim. Unfortunately, the only other form of immediate payment which may be made at present is an advance payment.[24] Because advance payments may be made only to alleviate hardship in meritorious claims, they are made infrequently.[25]

A second procedural problem concerns the role of the DCO. Both the NATO Status of Forces Agreement and the German-American Administrative Agreement provide that the receiving state shall recommend "in a fair and just manner" the amount of compensation which should be

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[16] *Id.* para 10–19*b*. Claims approved in excess of $25,000 but less than $50,000 are subject to the confirmation of the appointing authority. Within USAREUR, this function is performed by the USAREUR Judge Advocate. The author, as Deputy Chief/Commander of USACSEUR, serves on a three-member claims commission.

[17] *Id.* Theoretically, if an approving authority refused to confirm the action of a three-member commission, the commission could still approve a claim not to exceed $25,000. Although the commissions operate autonomously, any guidance by the appointing authority has been followed.

[18] AR 27–20, para. 10–20 (C18, 15 June 1984).

[19] The average processing time (from the date of filing until final action) of all nonscope claims adjudicated by USACSEUR during FY 84 was 286 days.

[20] Deduction of processing time by the DCO reduces the average processing time of nonscope claims to 106 days. Investigation by the DCO accounted for 63% of the total average processing time.

[21] NATO Status of Forces Agreement art. VIII, para. 6(b).

[22] 10 U.S.C. § 2734 (1982).

[23] AR 27–20, para. 13–2c(C18, 15 June 1984).

[24] *Id.* para. 10–21. Advance payments are made frequently by DCO offices in scope claims. These payments reduce the liability of the U.S. for interest on unpaid claims. These payments are not made in nonscope claims because payments are made entirely by the sending state and because payments are discretionary. No interest is paid on nonscope claims.

[25] An advance payment was last made by USACSEUR in a nonscope claim in 1975.

paid in a nonscope claim.[26] The problem is the weight to be accorded such recommendations.

"[L]ocal law and custom relating to elements of damage, *and compensation therefor*, will generally be applied . . . ."[27] Although local law and custom must be applied, the source of such local law or custom is undefined. it can be argued that USACSEUR generally is best able to value claims because of its institutional records in adjudicating many claims over an extended period. Individual Defense Costs Offices, particularly those in regions where there are few U.S. troops, have ahad less experience in valuing such claims because they process far fewer claims. However, the DCO is in a better position to assess regional differences or local sensitivity in particular cases. Even though the DCO has no financial stake in the payment of a nonscope claim, the principal problem has been recommendations which are considered too low in comparison to U.S. standards of valuation.

Claims for rape and other indecent assaults illustrate the problem. During FY 84, twenty-three claims in this category were approved. The average amount recommended by various Defense Costs Offices was Deutsch Mark (DM) 6,884.46, ranging in amount from DM 1,010 to DM 25,055.70.[28] The range of amounts approved for payment by the commissions in these cases was the same, but the average amount approved was DM 8,929.87, which represents an average increase of 30%. The percentage increase in the amounts approved for payment in each case ranged from 1% to 149% with an average percentage increase of 71%. In only two cases did DCOs recommend an amount higher than that approved by the commissions. To further complicate the problem, the amounts recommended by the three USACSEUR adjudicators also should be considered. The average amount recommended by the adjudicators was DM 8,476.40, approximately 23% higher than the average amount recommended by Defense Costs Offices. These adjudicators have over thirty-eight years of combined experience in reviewing such claims whereas the composition of the commissions changes regularly.

These differences illustrate the difficulty in valuing such claims. Although some of the differences can be attributed to additional evidence not considered by the Defense Costs Offices, the consistency of the differences reflects the commissions' difficulty in accepting the DCOs' low recommendations. Their recommendations cannot be disregarded because the DCOs are the primary investigative resources available to USACSEUR and they are notified of the commissions' decisions. To foster better relations with the DCOs and to demonstrate the importance of their recommendations, the commissions recently have begun to give sustantial weight to DCO recommendations. Absent abuse of discretion, lack of substantial evidence, or material error in law or fact, the recommendations of the Defense Costs Offices have been increasingly adopted by the commissions in all categories of nonscope claims.[29] This has necessitated greater coordination by the commissions with the DCOs to resolve significant differences of opinion. The evolution of this practice demonstrates how judge advocates must accommodate local law and custom while exercising independent judgment.

Substantive Issues

In addition to procedural problems, several substantive issues of general interest have been considered recently by the commissions. These issues include nonscope claims arising from foreseeable traffic accidents and apartment rental contracts.

A typical vehicle accident claim involves a German motorist who has collided with a pedestrian

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[26] Administrative Agreement part B, § V, no. 64.

[27] AR 27-20, para. 10-12 (C17, 15 Aug. 1981) (emphasis added).

[28] Although the rate of exchange varies daily, the average rate of exchange during FY 84 was $1. = Deutsch Mark 2.80.

[29] It has been speculated that societal prejudices may contribute to low DCO recommendations in claims by women for sexual assaults. Whether the commission should consider local law and custom that includes institutional discriminatory practices in determining an appropriate award could be a difficult policy choice. The objective of maintaining friendly relations could be disserved by disregarding local custom, but tacit approval of discriminatory practices could be antithetical to fundamental American values. The claims commissions at USACSEUR have not yet knowingly considered a claim in which a DCO recommendation was skewed because of a claimant's race, sex, creed, national origin, or other factor.

who is an off-duty service member. The nature of the soldier's negligence often varies. The soldier may have attempted to enter a crosswalk against the pedestrian signal or, as in one case, may have fallen asleep in the roadway after becoming intoxicated. Because the property damage to the automobile caused by the collision with the pedestrian resulted from the soldier's negligence, a claim would be cognizable under chapter 10 of AR 27–20.

The evidence available may indicate contributory negligence by the automobile driver. Contributory negligence by the claimant, however, does not bar recovery unless the claim "[r]esults wholly from the negligent or wrongful act of the claimant ...."[30] The Federal Republic of Germany is a comparative negligence jurisdiction, and chapter 10 of AR 27–20 provides that principles of comparative negligence should be applied to the extent practicable.[31] Under the German principle of *"Betriebsgefahr"*, or holder's liability, a motorist has the burden of demonstrating that the accident could not have been avoided notwithstanding the negligence of the other party. Therefor, unless the motorist can demonstrate that the accident was unavoidable and that nothing could have been done by the motorist to avoid the accident, some degree of liability (usually 20–25%) will be attributed to the motorist. This principle rests on the premise that automobiles are dangerous instrumentalities and that motorists assume an operational risk while driving an automobile.

Despite this principle of comparative negligence, claims of this nature have been difficult to adjudge because facts are often conflicting or incomplete. To resolve these claims, the commissions have fashioned a rule that motorists are presumed to have assumed certain risks associated with driving an automobile, such as encountering roadway hazards. This rule has the effect of barring certain claims completely. Because ordinarily only known risks may be assumed, the commissions have concluded that "foreseeable" risks are presumptively assumed by a reasonable, prudent driver. In this sense, foreseeability defines the extent of the risk deemed to have been assumed by the motorist. Unforeseeable risks are not assumed. This usage must be distinguished from the traditional tort concept of foreseeability which measures the extent of liability attributed to the tortfeasor.

Claims resulting from "foreseeable" risks in other activities have also been denied.[32] Although claims are adjudicated individually, claimants have been forced to resort to other remedies such as private insurance or civil litigation.[33] No exceptions to this rule have been made, but at least one situation has been considered informally. Under German law, persons responsible for exercising control of domestic animals are absolutely liable for personal injury or property damage caused by such animals.[34] Accordingly, a claim for damage to an automobile resulting from a collision with an unleashed pet could be compensable based on absolute liability.[35]

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[30] AR 27–20, para. 10–11*y* (C16, 15 Sept. 1980). Contrastingly, claims by service members for the loss, damage, or destruction of their personal property incident to service are barred if the loss resulted from *any* negligence or wrongful act of the claimant. AR 27–20, para. 11–6*a* (C18, 15 June 1984).

[31] *Id.* para. 10–9*c*.This reference to local principles of comparative negligence is stated even more plainly in the regulations implementing the Military Claims Act, 10 U.S.C. § 2733 (1982): "The law of the place where the act or omission occurred will be applied in determining the effect of claimant's negligence on his right to recover damages." AR 27–20, para. 3–11*b* (C18, 15 June 1984).

[32] Claims by prostitutes for personal injuries caused by dissatisfied customers have been denied as have claims by police officers for injuries or loss while apprehending a soldier. These decisions have been based upon AR 27–20, para. 10–11*q* (C16, 15 Sept. 1980) which provides that a claim is not payable when it is "not in the best interests of the United States, is contrary to public policy, or otherwise contrary to basic intent of the Foreign Claims Act ...." A claim resulting from a skiing accident also has been denied on this ground.

[33] It has sometimes been asserted that another purpose of the Foreign Claims Act is to shield service members from civil suit in local courts. While this often may be the result, the commissions' policy concerning foreseeable traffic accidents can have just the opposite effect. The availability of civil remedies is implied in the commissions' letter of denial to the claimant.

[34] German Civil Code § 833.

[35] Claims based on absolute liability are not excluded under chapter 10. Contrastingly, the principle of absolute liability is expressly precluded from applying to claims filed under the Military Claims Act. AR 27–20, para. 3–11c (C18, 15 June 1984).

Apartment leases have generated interesting claims exploring the interstice between contract and tort law. Several claims by German landlords have involved substantial damage to premises resulting from neglect or misconduct by military and civilian members of the Force.[36] These claims were all denied by claims commissions based on two separate provisions of chapter 10. Paragraph 10–11*b* provides that claims which are purely contractual in nature are not allowable, and paragraph 10–11*d* provides that claims which arise from private or domestic obligations rather than government transactions are also not allowable. This reasoning is supported by an express disclaimer in the standard USAREUR Housing Referral Office rental agreement.[37] There are, however, both legal and policy reasons which support a different conclusion.

A lessee's general obligation to return property in the same condition as it was received, fair wear and tear excepted, usually is based on contract. The standard USAREUR Housing Referral Office lease includes such a covenant.[38] Under German law, breach of this covenant may subject the lessee to an action for actual damages.[39] Under general principles of both German and American law, a party to a contract is not limited to contractual remedies if an independent cause of action can be brought, unless specifically prohibited in the contract.[40] In cases of this nature, a lessor could recover damages in an independent tort action for waste.[41] For example, general neglect of the premises by failure to protect the property or by accumulation of trash might constitute waste. Similarly, physical damage to the premises resulting from wilful conduct such as a domestic quarrel could also constitute waste. Although chapter 10 does not clearly specifiy the source of law to determine liability, general principles of both German and American law provide an action in tort for damages to premises. If a lessor has an independent cause of action not based on contract, such as an action in tort, a claim for damage resulting from a negligent or wrongful act or omission cannot be considered "purely" contractual in nature. Accordingly, such a claim should not be excluded from consideration because it is "contractual."

It should be noted that the disclaimer used in the standard USAREUR lease agreement might not bar a lessor's claim for damages.[42] The disclaimer excludes only those matters which are in dispute between the lessor and lessee. While the amount of damage might be in dispute, generally the issue of causation and liability is not. In the four claims of this type considered recently by USACSEUR, it was evident that the damages resulted from acts or omissions by the lessees. The disclaimer could be considered ineffective be-

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[36] Four recent claims were for DM 36,823.61; DM 9,111.60; DM 2,936.83; and DM 33,514.90. A witness statement accompanying one of the claims graphically described the problem:

> [T]he first thing I noticed was a rat running across the top of the cupboard down into the cupboard where it stared back at me through a small glass window ... [B]ags of garbage and trash have just been thrown all over the floor. Mice and mice droppings were found all over the house... The bed sheets were of grey brown color and were covered with blood and other kinds of stain. The sheets were stiff and dirty to the touch. The basement contained approximately 100 bags of trash. It was agreed by the medical personnel that the soldiers should wear rubber boots and gloves in addition to surgical masks for health reasons while cleaning.

[37] Para. 6, Special Conditions, of AE Form 3618 (1 Oct. 1980) provides:

> *LIABILITY OF U.S. GOVERNMENT.* Notwithstanding anything to the contrary appearing expressly in this contract, or implied, the United States Government, its agencies, or officials acting in an official capacity shall not be liable to the landlord for any matters in dispute between the landlord and the tenant, such as payment or rent or utility charges, assessment of damages, or similar matters.

[38] Para. 4, Special Conditions, of AE Form 3618 (1 Oct. 1980) provides in relevant part:

> *DAMAGES CAUSED BY TENANT.* Deterioration of or damage to property caused by the tenant will be paid by the tenant.... Damages caused by the tenant ... must be repaired as soon as possible.... Premises condition inventory form will identify conditions of dwelling at the time of rental negotiation and completing rental contract.

[39] Palandt's Commentary to German Civil Code § 548, annot. 3 (41st ed., 1982)

[40] *Id.* § 550; 17 Am. Jur. 2d *Contracts* § 522 (1964).

[41] 49 Am. Jur.2d *Landlord and Tennant* § 922 (1964); German Civil Code § 823. Section 823 is a general provision authorizing, *inter alia*, suits in tort for property damage resulting from wilful or negligent conduct. This section appears to be broad enough to parallel the American tort of waste which also includes any wilful or negligent conduct.

[42] AE Form 3618, *supra* note 37. The disclaimer would more likely be effective if the words of limitation, "in dispute," were deleted.

cause liability for damage was not a matter in dispute between the parties.

The four claims were denied by the commission on the alternate ground that the claims arose from private or domestic obligations as distinguished from government transactions.[43] This exclusion, however, seems meaningless, at least in USAREUR. All nonscope claims are necessarily private rather than governmental in nature, but, obviously, not all nonscope claims are barred. To give this provision some logical meaning, the operative words must be "obligations" and "government transactions" instead of the word "private." Not all obligations appear to be excluded. For example, legal obligations such as those arising from traffic laws are not excluded. The comparison between "private or domestic obligations" with "government transactions" suggests that the word "obligations" has a contractual connotation. However, claims which are "purely contractual in nature" are already barred as discussed previously. Accordingly, this provision cannot be considered a meaningful basis for denial of landlord claims for damages to premises.

Not all claims by lessors for damage to premises should be compensable even if such claims are considered to sound in tort. In the business of rental property, some level of damage obviously is foreseeable. Just as claims for other occupational risks or foreseeable traffic accidents have been denied, claims resulting from foreseeable property damage also could be denied. Commercial insurance and private litigation are appropriate alternatives.[44] If the lessor can establish that the nature or extent of damage was unforeseeable by objective, prevailing standards, then the claim could be adjudicated on its merits.

In addition to the legal reasons supporting payment of these claims, a significant policy consideration also favors payment. During a two and one-half year period beginning on 1 July 1980, nearly 2100 private rental units were removed from USAREUR housing referral lists.[45] The availability of adequate, private rental housing is an important concern.[46] Payment of meritiorious claims resulting from unforeseeable damage to premises caused by members of the Force generally would help foster improved relations between the United States and the Federal Republic of Germany and would aid the continuing effort to secure adequate housing.

Summary

These issues demonstrate some of the legal and policy considerations involved in adjudicating nonscope claims by commissions in USAREUR. Although these issues are unlikely to immediately confront most judge advocates, this discussion should aid in understanding the functions of claims commissions. If nothing else, it should be apparent that decisions in *ex gratia* claims are not decided *ex nihilo* (from nothing). This discussion also may spark reexamination of the purpose of *ex gratia* claims in a developed society where the United States maintains a sizeable presence. In many instances, *ex gratia* claims are tantamount to a victim's compensation proceeding. Whether such a function was ever envisioned by the Foreign Claims Act, or whether such a function should be continued, is beyond the scope of this article.[47] If the *ex gratia* claims procedures should be perpetuated, improved procedures and policies might be adopted based on the experiences of other jurisdictions.

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[43] AR 27-20, para. 10-11*d* (C16, 15 Sept. 1980).

[44] As part of installation clearance procedures, soldiers and DOD civilian employees assigned outside the continental United States are required to process through the housing referral office (HRO). Within USAREUR, there is an additional regulatory requirement that a premise condition inventory be conducted jointly with the landlord, tenant, and HRO representative at both the commencement and termination of the rental agreement. These procedures give the chain of command an opportunity to insure that soldiers pay their just obligations. *See* Dep't of Army, Reg. No. 210-51, Army Housing Referral Service Program (1 July 1983) and USAREUR Suppl. 1 to AR 210-51.

[45] Letter, HQ, USAREUR, AEAEN-EH-H, 12 Dec 83, subject: Offpost Housing and Soldier Indebtedness.

[46] USAREUR Suppl. 1 to AR 210-51, para. 4-2*c* (C3, 28 Aug. 1979). Obviously, the shortage of adequate housing is not evenly distributed throughout USAREUR. Commissions could consider evidence submitted by Community Commanders concerning the impact of particular claims within their communities.

[47] The Federal Republic of Germany has enacted its own victim's compensation system. Some claimants have already received compensation, and these amounts are considered by the commissions in adjudicating the claims.

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Effective Use of Residual Hearsay

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I. Introduction

The residual hearsay provisions of Military Rules of Evidence (Rule) 803(24) and 804(b)(5) are difficult to understand, and even more difficult to apply, but their use can be critical in prosecuting certain types of cases.[1] Resort to their use by trial counsel has increased dramatically, as reflected by the increasing number of opinions issued by the courts of military review interpreting their application. In fact, there are now more opinions interpreting the residual hearsay provisions than any other hearsay exception. These opinions highlight a number of problem areas for trial counsel, but, taken as a whole, they also demonstrate that a properly prepared trial counsel can win his or her case by using these provisions. This article will review the military decisions interpreting the residual hearsay exceptions, provide a way to analyze those cases and your future offers under either exception, and then focus upon three problem areas trial counsel need to avoid or to be properly prepared for. Finally, this article will highlight a recent Air Force opinion which is the most farsighted and far-reaching extension of the residual hearsay provisions.

[1] Mil. R. Evid. 804. Hearsay Exceptions; Declarant Unavailable.

....

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the military judge determines that (A) the statement is offered by evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Mil. R. Evid. 803(24), with the exception of the requirement for unavailability, is identical.

As this article is being written, the courts of military review (CMRs) have published twelve opinions interpreting the residual hearsay exceptions. The Air Force has published seven opinions; the Army has published five. The Navy court has not directly addressed either provision, nor has the United States Court of Military Appeals, although it recently granted review in two of the twelve CMR opinions.[2]

Significantly, seven of the twelve decisions involved prosecutions for child sex abuse. In these types of cases, the sworn statement originally obtained to substantiate the preferral of charges often becomes the critical evidence for the prosecution because the child victim recants, refuses to testify, or cannot be found at the time of her father or stepfather's trial. Both the Army and Air Force courts recently acknowledged this unusual need for the residual exceptions and their special application to child abuse prosecutions. In *United States v. Arnold*,[3] the Army court concluded that Rule 804(b)(5) "appears specifically designed to address the problem of family members who are witnesses to an intra-family criminal offense."[4] In *United States v. Barror*,[5] the Air Force court followed *Arnold*, and extended it, offering the opinion that "[*both* residual hearsay exceptions] were specifically designed to address the problems of family members who are witnesses to or victims of an intra-family criminal offense."[6]

II. Interpretation by Federal and Military Courts

The residual hearsay exceptions, which were adopted verbatim from the Federal Rules of Evidence, and which allow admission of hearsay which does not fit within one of the specifically enumerated hearsay exceptions, were controversial when first enacted as part of the federal rules. The passage of time has not made them any less controversial, and they have generated numerous federal decisions interpreting their scope and application. The earliest federal decisions examined the legislative history and intent behind the enactment of these provisions and concluded that they were to be strictly construed and rarely used.[7] On that basis, these courts appeared to require the proponent to show not just "equivalent" guarantees of trustworthiness, as specifically stated in the rule, but to demonstrate "exceptional" guarantees of trustworthiness before admission.[8] Nevertheless, at least one eminent scholar, Professor Edward J. Imwinkelried, concluded that a "liberal interpretation [was] a more literal, ... more purposive, and more reasonable construction of the residual exceptions."[9] In time, federal courts adopted this same view and the earlier view became discredited, although "no court has found it necessary to specif-

[2] The Navy court, in United States v. May, 18 M.J. 839 (N.M.C.M.R. 1984) addressed Rule 803(24) in cursory fashion after concluding that a civilian record of conviction was not admissible under two specific statutory exceptions, Rule 803(8) (public records), and Rule 803(22) (judgment of previous conviction). The court found the record also inadmissible, for the same reasons, under Rule 803(24). More recently, in United States v. McLane, No. 84-3904, (N.M.C.M.R. 24 Apr. 1984) (Unpub.), the Navy court had an opportunity to interpret the provisions of Rule 804(b)(5), but chose instead to reverse on the basis that the declarant was erroneously found to be unavailable under Rule 804(a). The court reached this conclusion after apparently ignoring the doctrine of waiver. The defense in *McLane* argued that the victim should not have been made to appear over the objection of her mother. While this technically was not a valid basis for finding unavailability, the intentional tactical choice on the part of the defense to not request the victim's presence, but instead defend against the paper statement, should have waived the issue. For that reason the Navy Judge Advocate General has certified this issue to the Court of Military Appeals. The Court of Military Appeals granted review on United States v. Powell, 17 M.J. 975 (A.C.M.R. 1984), *petition granted*, 19 M.J. 257 (C.M.A. 27 Dec. 1984) and United States v. Hines, 18 M.J. 729 (A.F.C.M.R. 1984), *petition granted*, 19 M.J. 246 (C.M.A. 17 Dec. 1984). The court also granted review on one other residual hearsay case, but upon different issues; *see* United States v. Arnold, 18 M.J. 559 (A.C.M.R. 1984), *petition granted*, 20 M.J. 129 (C.M.A. 28 Mar. 1985).

[3] 18 M.J. 559 (A.C.M.R. 1984).

[4] *Id.* at 561.

[5] 20 M.J. 501 (A.F.C.M.R. 1985).

[6] *Id.* at 503 (citing *United States v. Arnold*).

[7] *Hines*, 18 M.J. at 733.

[8] *Id.*; Fong v. American Airlines, Inc., 626 F.2d 759, 763 (9th Cir. 1980); deMars v. Equitable Life Assur. Soc. of U.S., 610 F.2d 55, 61 (1st Cir. 1979); Huff v. White Motor Corp., 609 F.2d 2286, 291 (7th Cir. 1979); United States v. Kim, 595 F.2d 755, 764-66 (D.C. Cir. 1979); United States v. Palacios, 556 F.2d 1359, 1363 n.7 (5th Cir. 1977).

[9] Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 San Diego L. Rev. 239, 260 (1978).

ically disavow the rationale" of the earlier cases.[10] currently, "all the circuits with the exception of the 2nd, 6th, and D.C.," have literally applied the requirement only for "equivalent" guarantees of trustworthiness, and have concluded that such a showing will also comply with the Supreme Court's standard for measuring "reliability" in compliance with the confrontation clause of the sixth amendment.[11] (The sixth amendment ramifications will be addressed later in this article.)

The military courts followed a similar progression. In 1982, the Air Force court issued the first military opinion interpreting the residual exceptions and cited a Fifth circuit opinion for the proposition that the exceptions "should be used sparingly...."[12] Similarly, the first Army opinion, *United States v. Whalen*,[13] cited a Third Circuit opinion for the proposition that the exceptions were created to allow admission of statements where "certain exceptional guarantees of trustworthiness exist...."[14] Later cases reiterated this conclusion.[15]

In 1984, however, Judge Miller, of the Air Force court, conducted an exhaustive review of the early federal decisions, as contrasted with more recent decisions from the same circuits, and properly concluded that the *literal* interpretation of the exceptions was the proper interpretation.[16] Thus, the Air Force court concluded that the requirement of "equivalent circumstantial guarantees of trustworthiness" means exactly that and only that, and the proponent of a residual hearsay statement, therefore, need only show that the statement has the same level of trustworthiness found in the least trustworthy exception under Rules 803 and 804.[17]

III. *United States v. Whalen*— The *Whalen* Criteria

The Army court in *United States v. Whalen*, provided an excellent format for analyzing whether a proponent has demonstrated the "equivalent circumstantial guarantees of trustworthiness" necessary to allow admission. Trial counsel should familiarize themselves with the four criteria set forth in *Whalen* because it will guide the preparation of their arguments to admit a residual hearsay statement and also guide their actual presentations to military judges.

Whalen involved an illicit drug buy. The buyer gave a sworn statement against the appellant on the same day he and the appellant were apprehended. The buyer then repudiated that statement at an Article 32 investigation held one month later, and continued to repudiate the statement at trial. Judge Leroy Foreman, writing for the court, reviewed the history of the residual hearsay exceptions and then set forth four criteria to be examined in determining whether residual hearsay statements are sufficiently trustworthy to allow submission. First, Judge Foreman noted that the buyer/declarant was present at trial and subject to cross-examination.

Second, Judge Foreman noted that the sworn statement was similar to two other enumerated hearsay exceptions: Rule 804(b)(3) (statements against penal interest), except for the fact that the declarant was *available*; and Rule 801(d)(1)(A) (prior inconsistent statements), except for the fact that the statement was not given at a prior "trial, hearing, or other similar proceeding" such as an Article 32 hearing. Judge Foreman considered the similarity to other ex-

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[10] *Hines*, 18 M.J. at 733.

[11] *Id.* at 735; *see* Moffett v. McCauley, 724 F.2d 581, 583 (7th Cir. 1984); United States v. Cowley, 720 F.2d 1037, 1045 (9th Cir. 1983); United States v. Van Lufkins, 676 F.2d 1189, 1192 (8th Cir. 1982); United States v. Thevis, 665 F.2d 616, 629 (5th Cir. 1982).

[12] United States v. Ruffin, 12 M.J. 952, 955 (A.F.C.M.R.), *petition denied*, 13 M.J. 494 (C.M.A. 1982), *quoting from* United States v. White, 611 F.2d 531, 538 (5th Cir. 1980).

[13] 15 M.J. 872 (A.C.M.R. 1983). The Army court, however, significantly modified this conclusion by its statement that a "a case need only be exceptional in the sense that it was not anticipated by the drafters and that it meets the *same* guarantees of trustworthiness established ... for other types of hearsay evidence." *Id.* at 877 (emphasis supplied).

[14] *Id.* at 877, *quoting from* United States v. Bailey, 581 F.2d 341, 347 (3d cir. 1978).

[15] *See, e.g.*, United States v. Crayton, 17 M.J. 932, 934 (A.F.C.M.R. 1983) ("the residual hearsay exception should be used sparingly....", *quoting from* United States v. White, 611 F.2d at 538); United States v. Thornton, 16 M.J. 1011, 1013 (A.C.M.R. 1983) (the requirements of the residual hearsay rules "must be strictly construed").

[16] *Hines*, 18 M.J. at 733–34.

[17] *Id.* at 738–40.

ceptions an indication of the hearsay statement's trustworthiness.

Next, Judge Foreman noted that the circumstances surrounding the making of the statement suggested its trustworthiness. The declarant had given a written, sworn statement, after a rights advisement when his memory of the incident was obviously fresh. An agent who took this statement testified to these circumstances.

Finally, Judge Foreman noted that there were independent corroborating facts to support the truth of the matters contained in the statement. The buyer—declarant claimed in the statement that he had given the appellant a $20 bill in exchange for a bag of marijuana and that the two had then smoked some marijuana. The officer who apprehended the two testified that the detected marijuana smoke upon entering the truck trailer where the two were, and saw a bag of marijuana lying between the two. Furthermore, when they were later searched, an agent found that the appellant had a $20 bill which was separate from the other money he had on his person.

The Army court has applied these *Whalen* criteria in some cases, and ignored or cursorily applied the criteria in other cases.[18] The Air Force court on the other hand, has never applied the four *Whalen* criteria. Nevertheless, in assessing the level of trustworthiness of the residual hearsay statements, the court has applied these same criteria as *Whalen*.

To better understand the application of these *Whalen* criteria, three cases are instructive. In *United States v. King*,[19] the court ruled against admission based upon its negative assessment of the satisfaction of the fourth *Whalen* criterion: independent corroborating facts. *King* was a complicated case involving multiple victims of appellant's sexual misconduct. The hearsay statements sought to be admitted were made by only one of the victims, who had married the appellant by the time of trial. The declarant-victim was fifteen at the time she gave three, sworn, written statements detailing the appellant's sexual acts with her at various places, including an off-post motel room and the appellant's BOQ room. The Army court noted that the statements met three of the four *Whalen* criteria: the declarant was subject to cross-examination (first criterion); the sworn statements were similar to Rule 801(d)(1)(A) (prior inconsistent statement) (second criterion), except for the fact that the interrogation was not equal to a prior trial or hearing; and the circumstances surrounding the making of the statement (third criterion) suggested trustworthiness. However, the absence of the fourth criterion (independent corroborating facts) caused the court to reject the statement because it found that the evidence presented at trial corroborated only *neutral* facts rather than facts of any crime. By contrast, the court noted that in *Whalen*, the independent facts corroborated the actual charged criminal activity of drug sale and use.

The court in *King* was probably applying the fourth criterion too technically, because, after all, the determination to be made was only admissibility and the government certainly presented facts which implied criminal activity and corroborated much of what the victim said in her earlier statements. The declarant admitted that she was with the appellant on each of the occasions and at each of the places where she had claimed in her statement they had had sexual relations. The declarant declined *only* the criminal (i.e., sexual) activity. On the stand, she explained why she had claimed in these statements that the sexual acts had occurred: to pin a possible pregnancy on appellant, someone she admired, rather than on the alleged real culprit, her father. While these facts suggesting bias might seem more than enough basis to deny admissibility, again remember that the determination to be made was only whether to admit these statements. The credibility factors above would go to the ultimate weight to be given the statements, and with the declarant present for cross-examination, the members could determine for

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[18] *Compare* United States v. King, 16 M.J. 990 (A.C.M.R. 1983); United States v. Thornton, 16 M.J. 1011 (A.C.M.R. 1983), (like *King*, it extensively analyzed the hearsay statement by applying the *Whalen* criteria); United States v. Powell, 17 M.J. 975 (A.C.M.R. 1984) (which simply cited the page in *Whalen* addressing the four criteria and concluded that the "same guarantees of trustworthiness" found in other exceptions were evident) *with United States v. Arnold* which ignored the *Whalen* criteria.

[19] *See King*, 16 M.J. at 997 (Hansen, C.J., concurring in part and dissenting in part).

themselves whether to believe her pretrial statements or her new version given at trial.

Finally, while the court claimed that only *neutral* facts were corroborated, a rendezvous between an officer and a fifteen-year-old girl in a motel room and in his BOQ room, and the fact that he hid her in his car upon his return to post from the motel, hardly seem to be *neutral* facts.[20] Apparently, the court found that there were legitimate, innocent reasons for paying for a motel room and taking a fifteen-year-old there (presumably to watch television or to discuss private matters without interruption or disturbance!).

Three weeks later, a different panel of the Army court decided *United States v. Thornton*,[21] and the court there, after applying the *Whalen* criteria, also held that a hearsay statement was improperly admitted. *Thornton* was an aggravated assault case. The accused was questioned by military investigators about beating his German girlfriend. During this questioning he orally admitted striking her with his hand approximately twenty times. An agent who heard this admission testified about it at trial. An assistant staff judge advocate obtained a sworn statement from the girlfriend-victim in which she claimed she was struck approximately fifteen times in the face by the accused. While the victim testified at the Article 32 investigation, she was unavailable at trial, and the government therefore offered her pretrial, sworn statement as residual hearsay under Rule 804(b)(5) (declarant unavailable).

The court found it necessary only to apply the first three *Whalen* criteria to find that the sworn statement was inadmissible under Rule 804(b)(5). The court looked at the opportunity for cross-examination (first criterion) and found it lacking. The court insufficiently addressed this criterion, however, in reaching that conclusion. The court concluded that it was more than a possibility that the defense counsel used the Article 32 hearing for discovery purposes alone, but never provided the basis for this assertion. That is, the court never cited portions of the Article 32 transcript to support its assertion, but simply made a categorical generalization.

The *Thornton* court then found against the government by applying the second *Whalen* criterion, the similarity to other statutory exceptions. The court found not only that the statement was not similar to any other statutory exception, but would actually be forbidden by the public records exception. Rule 803(8), because the court concluded that the assistant staff judge advocate was acting in a law enforcement capacity in taking the statement and that Rule 803(8)(B) excludes "all matters observed by police and other personnel acting in a law enforcement capacity."[22]

The court's application here was ironic because this *Whalen* criterion was applied in *Whalen* to find trustworthiness in a sworn statement not just taken by an officer *acting* in a law enforcement capacity, but by law enforcement agents themselves. Under such circumstances, the *Whalen* court nevertheless found the statement similar to Rules 804(b)(3) *and* 801(d)(1)(A), while the court in *Thornton* found *no* similarity. Furthermore, the *Whalen* court found no prohibition imposed by Rule 803(8)(B). The *Whalen* court reached the proper conclusion because only similarity is considered, *not* technical compliance with a statutory exception. If technical compliance were required, there would be no use for residual hearsay: the proponent would simply introduce a statement under the specifically enumerated statutory exception.

The court properly applied the third *Whalen* criterion, the circumstances surrounding the making of the statement. In *Thornton*, the statement was not taken until four months after the alleged incident, while in *Whalen* a statement was taken the same day when memories would be fresh. Furthermore, the government made no showing of special trustworthiness which might have helped overcome the negative impact of the four month delay in obtaining a statement.

Finally, the court did not specifically address the fourth *Whalen* criterion, independent corroborating facts, but did conclude that there was a "lack of any indicia of trustworthiness."[23]

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[20] *Id.* at 1014.

[21] 16 M.J. 1011 (A.C.M.R. 1983).

[22] United States v. Thornton, 16 M.J. at 1014.

[23] *Id.*

Even assuming the *Thornton* court might have reached the right conclusion due to the lack of corroborative evidence, they nevertheless misapplied two of the four criteria.

In a more recent opinion, the Army court provided a more reasonable analysis of this issue. In *United States v. Hubbard*,[24] Judge Werner concluded (while considering a different hearsay provision) that a court must look at the *actual* cross-examination to determine whether it was used only for discovery purposes. In *Hubbard*, Judge Werner noted numerous instances where the defense clearly used the Article 32 questioning for more than discovery purposes. Judge Werner, therefore, concluded that the same motive to develop the testimony was apparent and the Article 32 testimony was therefore properly admissible.

The Navy court followed the *Hubbard* rationale, but went even further, in *United States v. Connor*.[25] There, even while there was no "classic cross-examination" at the Article 32 investigation, on lengthy defense questioning, the similar motive to attack the witness' credibility was sufficient to supply the necessary trustworthiness for its admission under the former testimony exception, Rule 804(b)(1), and to withstand an attack based on the confrontation clause of the sixth amendment.

As trial counsel, you should not allow the defense to cite *Thornton* for the proposition that no real opportunity for cross-examination existed to support admission of residual hearsay where it occurred only at an Article 32 proceeding. Instead, if questions were asked at the Article 32 which would be similar to questions asked at trial, note this for the military judge and submit a copy of the Article 32 investigation as an appellate exhibit with those areas highlighted. This article will later discuss the use of verbatim Article 32 testimony under Rule 804(b)(1) so that there is no need to resort to residual hearsay. Trial counsel should cite *Hubbard* for the proposition that a case-by-case analysis must be made to determine the sufficiency of the opportunity for cross-examination.

[24] 18 M.J. 678 (A.C.M.R. 1984).

[25] 19 M.J. 631 (N.M.C.M.R. 1984).

The Air Force court had the opportunity to apply the *Whalen* criteria in *United States v. Crayton*,[26] a child sex abuse case, although it ignored the second *Whalen* criterion (similarity to other statutory exceptions), and never explicitly applied the other criteria as the *"Whalen"* criteria.

As occurs in many sex abuse cases, the fourteen-year-old stepdaughter in *Crayton* executed a sworn statement detailing the sexual acts, but retracted that statement at trial. Furthermore, the victim's brother and mother had joined the effort to foil the prosecution by the time of trial. Both the brother and the mother testified that she "was untruthful and would do anything to get attention."[27] The victim testified that she made the statement because she "hated the accused and resented her mother marrying him."[28]

The court did not specifically address how the opportunity for cross-examination affected and/or enhanced the pretrial statement's trustworthiness. Instead, the court focused upon the child's direct testimony in which she gave a plausible reason why she made the pretrial statement. Failing to address this opportunity for in-court testimony was nearsighted. Again, as in *King*, only admissibility was being decided by the military judge, and, as the reviewing court noted, unless the military judge "*clearly* abuse[d] his discretion" in admitting evidence, his decision should have stood.[29] The child victim's personal presence was a significant factor in providing the whole story for the members to consider in determining whether the earlier statement or the in-court testimony was more credible.

As stated, the court ignored the second criterion, the sworn statement's similarity to Rule 801(d)(1)(A), prior inconsistent statement. The court also did not specifically address the third criterion: the circumstances surrounding the making of the statement. It did note in the facts that many of the incidents occurred months before the sworn statement was obtained.

[26] 17 M.J. 932 (A.F.C.M.R. 1983).

[27] *Id.* at 933.

[28] *Id.*

[29] *Id.* at 934 (emphasis in original).

The court decided this case because of its conclusion that no independent corroborating facts were admitted to support the statement, the fourth *Whalen* criterion. This conclusion seems clearly flawed. The victim alleged that the accused "made her engage in various sex acts including fellatio and cunnilingus."[30] Prior to trial, after advisement of rights, the accused admitted that he had fondled his stepdaughter's breasts and genitalia on two occasions, he denied any other sexual contact. Furthermore, the accused "*judicially confessed* to fondling his stepdaughter's breasts."[31] The court nevertheless concluded that there was a "dearth of . . . testimonial evidence" to support the truthfulness of the out-of-court statement, and citing *King*, the court concluded that the military judge had clearly erred by admitting the statement. In *King*, it was perhaps arguable that an officer's rendezvous with a teenager in a motel room did not corroborate criminal wrongdoing, but only innocent acts; how the *Crayton* court could likewise determine that the accused's admission of fondling his stepdaughter's breasts and genitalia did not corroborate the criminal wrongdoing alleged in her statement, is difficult to understand. It is especially difficult to do so after the court concluded the judicial confession was sufficient to affirm a *criminal* conviction for assault upon a female under sixteen years of age![32]

Perhaps the most plausible explanation for this inconsistency was the fact that the victim and the entire family were fighting to obtain an acquittal by the time of trial. A hint that such intangible factors might have affected the court's reasoning, may be seen in their caution that the holding of *Crayton* did not signal a change from its earlier *Ruffin* decision ("We caution those who read this opinion to do so narrowly. . . .").[33]

IV. Special Considerations

In the residual hearsay cases, three issues have arisen of which you should be especially aware. The first involves notice. The second involves introducing a statement in the absence of the declarant, or where the declarant was declared unavailable pursuant to a subsection of Rule 804(a). The third concerns the using an admission or confession of the accused to supply independent corroboration to satisfy the fourth *Whalen* criterion.

A. Notice

The first issue has been addressed in only two reported military opinions, yet it has caused problems for many counsel at the trial level. both Rules 803(24) and 804(b)(5) require notice "sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of, including the name and address of the declarant."

No military decision has discussed what constitutes sufficient advance notice. In *United States v. White*,[34] the Air force court simply noted that the government "had given the defense notice of its intent to introduce [the declarant's] statement under Mil. R. Evid. 804(b)(5)."[35] More recently, in *United States v. Barror*,[36] the Air Force court noted the military judge's finding that "adequate" notice was given. The federal courts, however, have more readily addressed the notice requirement and have even reversed cases for lack of compliance.[37]

Trial judges in U.S. Army, Europe, have advised TCAP that they have refused to admit statements under either residual hearsay exception when notice was provided only as an afterthought immediately prior to trial.[38] It is easy to miss this procedural requirement when preparing to meet the substantive requirements of the exceptions. Furthermore, many counsel prepare to offer a statement under a specific exception not requiring notice, and resort to the residual ex-

[30] *Id.*

[31] *Id.* at 935 (emphasis supplied).

[32] *Id.*

[33] *Id.* at 934.

[34] 17 M.J. 953 (A.F.C.M.R. 1984).

[35] *Id.* at 955 n.2.

[36] 20 M.J. 501 (A.F.C.M.R. 1985).

[37] *See* United States v. Atkins, 618 F.2d 366, 372 (5th Cir. 1980); United States v. Ruffin, 575 F.2d 346, 358 (2d Cir. 1978).

[38] Comments made to author at the September 1984 USAREUR Military Judges Conference in Garmisch, FRG.

ceptions only after an unexpected ruling. This practice can be fatal to your case. Instead, whether you believe you have a properly admissible statement under a specifically enumerated exception, *e.g.*, Rule 803(2) (excited utterance) or Rule 803(4) (medical treatment), also give written notice under the applicable residual exception just in case.

If you have provided arguably insufficient notice, be prepared to cite *United States v. Parker*,[39] which held that the notice requirement is not controlling if the accused cannot show harm by noncompliance, and if the accused had a fair opportunity to meet the hearsay statements. *Parker* is especially pertinent for child abuse cases where specific prejudice would be nonexistent; the accused certainly knows who his own daughter or stepdaughter is and that she made a statement, and often is the primary reason why the victim is not available or unwilling to testify in person.

B. Unavailability/Lack of Confrontation

The second issue has caused problems because of trial counsel's failure to recognize the issue and/or to take adequate steps to prevent it from developing. Any time that a statement against an accused is introduced and the person making the statement is not present at trial for cross-examination, a confrontation clause issue under the sixth amendment arises. Seven of the twelve residual hearsay statements in the recent cases were admitted due to unavailability of the declarant. The admission of these statements in the absence of the declarants was affirmed in four of the twelve decisions.[40]

Obviously, the absence of a declarant at trial makes the admission of a statement under the residual hearsay exceptions much more difficult, even without addressing the underlying confrontation clause issue. Unfortunately, in child abuse cases this issue often arises because the family will pressure the victim to retract, refuse to testify, or to be absent from trial. In such cases you should ensure that Article 32 testimony is transcribed verbatim, in order that you may attempt to introduce this testimony in the declarant's absence under Rule 804(b)(1) (former testimony) (verbatim transcript a requirement under this section), or to introduce it under Rule 801(d)(1)(A) (prior inconsistent statements) if the declarant is present at trial but retracts her earlier testimony. By doing this you will avoid the whole issue of residual hearsay. One other alternative for avoiding the issue is to request that a videotaped disposition be conducted at the earliest opportunity, before the family has a chance to cause the victim to have second thoughts about going forward with the prosecution.[41] Your offer of proof to support a showing of "other reasonable cause" under Article 49(d)(2) of the UCMJ to justify the deposition could include the opinion of a psychiatrist, psychologist, or other mental health experts that the child victim will probably retract, refuse to testify, *etc.*, by the time of trial due to psychological/familial pressure, having nothing to do with the truth of the original allegations.[42]

The most recent Army opinion interpreting residual hearsay involved child sex abuse, and once again highlighted the issue of the absent declarant. At trial the government, in *United States v. Arnold*,[43] successfully relied upon Rule 803(24), Which states that availability is immaterial, to justify the admission of the absent declarant's pretrial sworn statement given to CID. On appeal the Army court held the sworn statement to be inadmissible under Rule 803(24). The Army court noted, however, that the sworn statement to CID simply repeated earlier allegations made to a school counselor and these earlier allegations were held on appeal to be properly admissible under Rule 803(2), the excited utterance exception.

As discussed earlier,the absence of the declarant at trial raised a potential confrontation clause issue under the sixth amendment. The court, however, chose not to address the confrontation

[39] 749 F.2d 628, 633 (11th Cir. 1984).

[40] *Barror*, 20 M.J. 501, United States v. Henderson, 18 M.J. 745 (A.F.C.M.R. 1984); *Hines*, 18 M.J. 729; *Ruffin*, 12 M.J. 952.

[41] UCMJ art 49; MCM, 1984, R.C.M. 702.

[42] *See* State v. Middleton, 657 P.2d 1215 (Ore. 1983) (*i.e.*, child psychiatrist properly allowed to testify that child sex abuse victims often retract their allegations due to familial/psychological pressure).

[43] 18 M.J. 559 (A.C.M.R. 1984).

cause issue, but instead decided the case wholly under the Rules. The Court of Military Appeals, on the other hand, has chosen to address the underlying confrontation clause issue in *Arnold* in its grant of review.[44] The Army court concluded that, when read in context, Rule 803(24) also requires the showing of unavailability that Rule 804(b)(5) *explicitly* mandates, *or* the proponent must demonstrate "peculiar circumstances" which guarantee trustworthiness in the absence of the declarant.[45]

It is essential to understand the problem of unavailability. While the confrontation clause became an issue in this case because of the absence of the declarant, the Supreme Court in *Ohio v. Roberts*,[46] provided a simple standard by which to demonstrate unavailability that will comply with constitutional standards. The Court held that the government need only show that it attempted in *good faith* to secure the presence of the witness, and good faith would be judged by a standard of *reasonableness*. Once such a showing has been made, the hearsay statement may be admitted as long as it is determined to be "reliable."[47] Remember that under Rule 804(b)(5) unavailability must also be shown. Because of the underlying confrontation clause issue in all cases admitting hearsay in the absence of the declarant, it is always wise to make this showing, even when the statement is offered under Rule 803, which does not require a showing of unavailability (any reluctance to do this should have been dispelled by the *Arnold* opinion). A showing of unavailability under the Rule should always meet the "good faith" standard set forth in *Roberts*.

Unfortunately, the trial counsel in *Arnold* made no attempt to demonstrate unavailability, under either the Rules or under the *Roberts* standard (however, until the Army court interpreted Rule 803(24) to require the same demonstration of unavailability as Rule 804(b)(5), there was no way the trial counsel could have known this.) Obviously, the government's failure to demonstrate unavailability led to a disastrous result.[48]

Remember, then, to make clear all attempts to secure the declarant's presence for *either* residual hearsay provision if your witness is unavailable; or place the burden on the defense to affirmatively waive the presence of the declarant. Many defense counsel, especially in a child abuse case, would rather fight the paper statement than have the innocent and vulnerable looking child victim appear in court. If you know in advance that your victim-declarant will not be present, you should be able to show a good reason *why* he or she is not available. If, on the other hand, the victim-declarant's absence is a last minute development, advise the military judge of this and request a continuance to obtain the victim's presence, *unless* the defense will waive such presence for cross-examination. An affirmative waiver will avoid an appellate issue based on the lack of confrontation.[49]

Even if your victim-declarant is absent from trial, take heart: neither the Rules nor the confrontation clause will forbid admission of a hearsay statement, including residual hearsay, as long as it is sufficiently trustworthy (Rule

[44] 20 M.J. 129 (C.M.A. 1985): "Whether the appellant's right of confrontation under the Sixth Amendment of the United States Constitution was violated by admission of the alleged victim's out-of-court statements, where the Government failed to demonstrate (1) actual unavailability of the alleged victim and (2) sufficient steps to secure her presence at the court-martial."

[45] *Arnold*, 18 M.J. at 561.

[46] 448 U.S. 51 (1980).

[47] *Id.* at 66. Several federal circuits have held that an accused waives a confrontation clause issue where the government can show that the accused caused the declarant's unavailability. United States v. Thevis, 665 F.2d 616, 627 (5th Cir. 1982); United States v. Balano, 618 F.2d 624 (10th Cir. 1980), *cert. denied*, 449 U.S. 840 (1980); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976). The above authority is especially applicable to child abuse cases where the child's parents may exert psychological pressure upon the child not to testify or appear, or actually arrange for the child's disappearance.

[48] One clear example of the minimal showing required to demonstrate "good faith" under *Roberts*, as well as to comply with Rule 804(a)(5), is *Thornton*. The court found that the government had done enough to secure the witness' presence where it had obtained a subpoena, sought assistance from the declarant's mother, friends, and the German police in locating her, and had looked for her at her legal residence and at her various hangouts (16 M.J. at 1013).

[49] *See* Diaz v. United States, 223 U.S. 442 (1912) (right to confront witnesses may be waived); United States v. Mahone, 14 M.J. 521, 526 (A.F.C.M.R. 1982) (accused may waive a constitutional provision intended for his benefit).

804(b)(5)), or "reliable."[50] The Army court, in *Arnold*, did not find the "peculiar circumstances" demonstrating sufficient trustworthiness under Rule 803(24) and, by extension, of sufficient reliability to pass muster under *Roberts*. The court reached this conclusion even though it had before it a confession by the appellant supporting the truth of the statement. Surely that confession provided "peculiar circumstances" demonstrating sufficient trustworthiness. The conclusion by the court that there was an insufficient demonstration of trustworthiness was flawed because it was inconsistent with the court's later conclusion that the hearsay statement's admission was nonprejudicial where the appellant's confession helped to prove his guilt *beyond a reasonable doubt*![51] If the confession was that clear and convincing, it was certainly enough to show that the statement was peculiarly trustworthy. The court was probably concerned about using an accused's confession to support the admission of a statement that needs corroboration because, of course, a confession itself cannot be admitted without a sufficient showing of corroboration.[52] This issue, however, was addressed by the Court of Military Appeals in *United States v. Lee*,[53] where the court held the interlocking confessions could each be admitted as corroboration for the other.

C. Admission or confession as an Independent, Corroborating Fact

This reluctance to accept an accused's admission of confession in assessing sufficient independent corroborating facts has been demonstrated by the Air Force court as well as the Army court and is the third troublesome issue in these cases. Beginning in *Ruffin*, the Air Force court focused upon other facts to find sufficient corroboration for admission while *ignoring* the appellant's admission. As discussed earlier, in *United States v. Crayton*,[54] the court again completely ignored the appellant's pretrial admission to most of the sexual misconduct found in the challenged statement when assessing corroboration. The Air Force court in *Hines*, however, reached the common sense conclusion that confessions and admissions certainly provide independent corroboration for the truthfulness of the residual hearsay statement.

V. United States v. Hines

Judge Miller, who authored the *Hines* opinion, provided an exhaustive analysis of the residual hearsay provisions, as interpreted by the federal courts. This analysis supports the *expanded* use of the residual hearsay provisions, especially in child abuse cases. By this same analysis, Judge Miller concluded that the trustworthiness required to justify admission of residual hearsay is simply equal to or greater than the least trustworthy of the other enumerated exceptions under Rules 803 and 804.[55] Judge Miller also explained that demonstrating such equivalent guarantees of trustworthiness will satisfy the "reliability" requirement set forth in *Roberts* to justify admission of hearsay in the absence of the declarant at trial.[56]

In *Hines*, Judge Miller also provided an excellent blueprint for laying the foundation for justifying admission of statements under *either* of the residual hearsay exceptions. Although Judge Miller did not cite *Whalen*, each of the areas he highlighted as providing sufficient trustworthiness fit within the categories listed in *Whalen*.

Hines was another case involving child sex abuse. Both the daughter-victims and their mother executed sworn statements to agents detailing the appellant's offenses. As might have been anticipated, while the victims and the mother were present at trial, all refused to testify and were, therefore, found to be unavailable under Rule 804(a)(2). The basis for their refusal was clearly their unwillingness to see their father-husband convicted, and none ever retracted the allegations made in the statements.

Judge Miller first found the statements similar to Rule 804(b)(3) (declarations against interest) (*Whalen's* second criterion) under a unique, but

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[50] Ohio v. Roberts, 448 U.S. at 66.

[51] *Arnold*, 18 M.J. at 562.

[52] *See* Rule 304(g).

[53] 6 M.J. 96 (C.M.A. 1978).

[54] 17 M.J. 932 (A.F.C.M.R. 1983).

[55] *Hines*, 18 M.J. at 739.

[56] *Id.* at 734-35.

common sense, analysis. Rule 804(b)(3) statements are assumed to be trustworthy because of the assumption that a person does not lightly make admissions to facts which could lead to criminal prosecution. By the same reasoning, Judge Miller concluded that a court can assume the same trustworthiness where allegations of sex abuse or incest are made because no victim makes such allegations lightly where they can affect the financial stability of the family (*i.e.*, if the father should go to jail), and can subject the child to "societal stigma" nothing less than "personally devastating."[57] Rule 804(b)(3) was not itself available as a basis for admission because the rule does not specifically provide for this type of situation as a declaration against interest.[58]

Next, he found trustworthiness in the circumstances surrounding the making of the statement (*Whalen's* third criterion). Judge Miller noted that the statements were written, sworn, and each corroborated the contents of the others. Furthermore, the agents who took these statements apparently testified in detail as to how the interviews leading up to the statements were conducted, and these details demonstrated trustworthiness.

Finally, Judge Miller found independent corroborating facts (*Whalen's* fourth criterion) on the basis of numerous facts, not the least of which was appellant's confession to four of the five charged offenses. Some of these facts included opinion testimony that the three declarants had earned reputations for truthfulness, and testimony by neighbors that "things weren't right" in the family at the time of the alleged offenses.

The one *Whalen* criterion not found in Hines was the opportunity for cross-examination. Judge Miller nevertheless found the collection of factors not trustworthy that the statement complied with the "reliability" requirement of *Roberts*, and also complied with the trustworthiness requirements of Rule 804(b)(5).

VI. Conclusion

Each of these twelve cases, but especially *Hines*, demonstrates that trial counsel must be able to lay a proper foundation before these statements will be admitted. *Hines* also demonstrates just how effective a creative trial counsel can be when laying that foundation. Corroborating the basis of the pretrial statements by calling reputation witnesses as to trustfulness, and neighbors to show that "things weren't right" in the family at the time of the abuse, were two new ways to lay a sufficient foundation; and they *worked*! The *Hines* case shows that trial counsel can lay a sufficient foundation by showing numerous little facts which, when considered together, will justify admission. *Hines* also demonstrates that the *Whalen* criteria are designed for flexible application. The absence of one criterion (in *Hines*, the lack of cross-examination) can be overcome by a strong showing of the other criteria. In the same way, a weak showing in one, two, or even three should not be an automatic bar if there is a strong showing of the fourth. Finally, what *Hines* and each of the other cases demonstrate is that the admission of residual hearsay statements is a difficult task requiring thoughtful planning (including notice) and mastery of the cases interpreting the exceptions so that you can guide the military judge when arguing why the statement offered is sufficiently trustworthy.

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[57] *Id.* at 742.

[58] Twenty-six days after the *Hines* opinion, a different panel of the Air Force court concluded that a literal application of Rule 803(24) required that in assessing the similarity to other statutory exceptions, *only* those found in 803(1) through (23) could be considered. United States v. Harris, 18 M.J. 809,813 (A.F.C.M.R. 1984). Likewise, the *Harris* court concluded that when hearsay is offered under Rule 804(b)(5), only similarity to 804(b)(1) through (4) may be considered. The *Harris* court noted that on similar facts the Army court in *Whalen* did *not* make this distinction, but in fact likened the statement there offered to Rule 804(b)(3) (statement against penal interest) even though the statement was offered under Rule 803(24) because the declarant was available to testify. Furthermore, the *Whalen* court likened the statement to Rule 801(d)(1)(A) (prior inconsistent statement), which is clearly not an exception under *either* 803 or 804. The *Whalen* court's rationale is more persuasive. The similarity to other hearsay exceptions is simply one factor of many which suggests trustworthiness, and the drafters arguably included this phrase only to emphasize that there must be the same kind of trustworthiness found in other hearsay exceptions, *or* in hearsay specifically defined by statute as nonhearsay (*e.g.*, Rule 801(d)(1)(A)).

COMA Returns Fire

In a series of return "salvos,"[1] the Court of Military Appeals has answered the Navy-Marine Court of Military Review[2] regarding the relevancy of "good military character" evidence in drug cases. In its leading case, *United States v. Vandelinder*,[3] the Court of Military Appeals held that evidence of an accused's "good military character" was pertinent to charges of wrongful possession, transfer, and sale of lysergic acid diethylamide (LSD) brought against the accused.

The issue on appeal in *Vandelinder* was whether the military judge erred by excluding evidence of the accused's enlisted performance records. The performance records concerned a period of three years of military service (from the accused's initial enlistment into the Navy until his trial). Contained within the accused's performance record were various evaluations which provided ratings for five traits: professional performance; military behavior; leadership and supervisory ability; military appearance; and adaptability.

In evaluating whether this evidence was admissible, the Court of Military Appeals addressed the relationship between illicit drug activity and military service. In reversing the Navy-Marine Court of Military Review decision in *United States v. Vandelinder*,[4] the Court of Military Appeals agreed with the dissenting opinion of Senior Judge Gladis that "the decision of a seller to participate in and accelerate the infusion of illegal controlled substances within the structure of the military organization represents a flagrant disregard for his responsibilities to his fellow soldiers, marines, sailors or airmen, and to the forces of his nation.[5] The court further agreed with Judge Gladis that "a person of good military character is less likely to commit offenses which strike at the heart of military discipline and readiness.[6] Accordingly, the Court of Military Appeals held that "a fact-finder could reasonably infer that a person of 'good military character' would be unlikely to participate in an activity that is so harmful to military readiness" and that a service member was entitled to "reap the benefits of the 'good military character' he has demonstrated in years past."[7]

Consequently, the argument whether Military Rule of Evidence (Rule) 404(a) departed from its predecessor, paragraph 138(f)(2) of the 1969 Manual for Courts-Martial, as to the admissibility of "good military character" to show the probability of innocence, have been put to rest, especially in drug cases.

Viewed within the framework established by other cases in this field (*i.e.*, *United States v. Clemons*;[8] *United States v. McNeil*[9]; *United States v. Piatt*[10]; *United States v. Klein*[11]) it seems clear that the Court of Military Appeals will hold that evidence of "good military character" is relevant in virtually every case where the offense could be construed as harmful to military effectiveness.

What issues should trial counsel now anticipate? First, *Vandelinder* does not mean that trial counsel should abandon a careful analysis of character evidence offered on behalf of the accused. Indeed, in *Vandelinder*, the Court of Military Appeals recognized that "performance reports . . . may contain a substantial amount of information which is inadmissible under Military Rule of Evidence 405."[12] The court also recognized that "testimony about someone's 'good military character' almost inevitably is somewhat

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[1] United States v. Traveler, 20 M.J. 35 (C.M.A. 1985); United States v. Vandelinder, 20 M.J. 41 (C.M.A. 1985); United States v. Weeks, 20 M.J. 22 (C.M.A. 1985); United States v. Wilson, 20 M.J. 31 (C.M.A. 1985).

[2] United States v. McConnell, 20 M.J. 577 (N.M.C.M.R. 1985). *See also* Government Brief, *The Army Lawyer*, April 1985, at 37.

[3] 20 M.J. 41 (C.M.A. 1985).

[4] 17 M.J. 710, 712 (N.M.C.M.R. 1983).

[5] 20 M.J. at 44–45.

[6] *Id.* at 45.

[7] *Id.* at 46.

[8] 16 M.J. 44 (C.M.A. 1983).

[9] 17 M.J. 451 (C.M.A. 1984).

[10] 17 M.J. 442 (C.M.A. 1984).

[11] 20 M.J. 26 (C.M.A. 1985).

[12] 20 M.J. at 46 (C.M.A. 1985).

imprecise."[13] For these reasons, the court recognized that considerable discretion must be allowed the trial judge to determine the extent of character evidence that is admissible. The court reasoned that the military judge may:

> [R]eceive Enlisted Performance Reports in evidence with instructions for the court members to disregard specific instances of conduct described therein. This course is appropriate if the judge believes that the court members, who often are experienced in reading such documents, will readily be able to sort out the portions which they should consider with respect to the accused's character. Other alternatives are to redact or cover a portion of the document or to require the parties stipulate as to the material contents of the document and only receive the stipulation in evidence.[14]

Evidence of "good military character" *is* often imprecise and frequently resembles specific acts of conduct more than general good character evidence. Because specific acts of conduct are frequently offered under the guise of "good military character," trial counsel should seek in advance of the introduction of "good character evidence" to limit the scope of this evidence. A *motion in limine* is a good way to establish appropriate limitations to evidence of "good military character."

Trial counsel should also be aware of the issues which reigned regarding character evidence before the adoption of the Military Rules of Evidence. Cases such as *United States v. Carpenter*,[15] *United States v. Williams*,[16] *United States v. Jouan*,[17] and *United States v. Tangpuz*,[18] should be reviewed. These cases present issues which may develop in cases where character witnesses are deemed essential to the defense. *Carpenter* established that the defense has the right to compel the attendance of a witness on the accused's behalf once the relevancy and materiality of the witness' testimony witness has been established. A compelled stipulation of testimony that is relevant and material, as compared to stipulation of fact, is not an adequate substitute for personal appearance by the witness.[19] *Williams* established that an accused is entitled to the live testimony of witnesses who can establish the credibility of the accused as to different time periods during which they respectively served with the accused.[20] *Jouan* established that the accused has the right to compulsory process of the "most credible" witness even though other similar testimony is available.[21] And *Tangpuz* established that there is no inelastic rule to determine whether an accused is entitled to the personal attendance of a witness. Instead, the holding in *Tangpuz* established several relevant factors to be considered by the military judge in assessing whether to order the presence of a defense requested witness: the issues involved in the case; the importance of the requested witness as to those issues; whether the witness is desired on the merits or the sentencing portion of the trial; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as deposition, interrogatories, or previous testimony.[22]

Trial counsel must be alert to Rule for Courts-Martial 703(b)(2)[23] in analyzing the aforemen-

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[13] *Id.* at 45.

[14] *Id.* at 46.

[15] 1 M.J. 384 (C.M.A. 1976).

[16] 3 M.J. 239 (C.M.A. 1977).

[17] 3 M.J. 136 (C.M.A. 1977).

[18] 5 M.J. 426 (C.M.A. 1978).

[19] United States v. Carpenter, 1 M.J. at 386.

[20] United States v. Williams, 3 M.J. at 243.

[21] United States v. Jouan, 3 M.J. at 137.

[22] United States v. Tangpuz, 5 M.J. at 429. Judge Perry stated: "While it cannot be said that performance ratings in the usual case are an acceptable substitute for live testimony of the raters, *id*, I believe that under the peculiar facts of this case, it is legitimate to conclude that the uncontroverted character of the appellant's service during the entire period adequately was established for purposes of shedding light on what would be an appropriate sentence ...." *Id.* at 430. At the very least performance ratings may establish harmless error. *Id. See also*, Gilligan & Lederer, *The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation*, 101 Mil. L. Rev. 1, 13-18, 62-64 (1983).

[23] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 703(b)(3) [hereinafter cited as R.C.M.].

tioned issues within the context of the "unavailable witness." This rule provides, in part, that if there is no adequate substitute for the unavailable witness, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings "unless the unavailability of the witness is the fault or could have been prevented by the requesting party." Rule 703(c)(2)(C) imposes upon the defense the requirement to submit the name of a defense witness to the government "in time reasonably to allow production of each witness on the date when the witness' presence will be necessary." Failure to submit the name of a witness in a timely manner, without good cause shown, permits denial of a motion for production of the witness.[24]

Whether the Court of Military Appeals intended the *Vandelinder* case to open this *Pandora's Box*, or will later determine to limit its holding to evidence of "good military character" in the form of personnel evaluation reports, is open to speculation. At present, it is clear that guidance will be needed and that trial counsel should be prepared to answer the central question of whether an accused charged with illicit drug activity is entitled to the personal presence of the best character witnesses, past and present, wherever they are located.

[24] R.C.M. 703(c)(2)(C).

The Ultimate Issue

On 12 October 1984, Congress passed the Comprehensive Crime Control Act.[1] One of the striking changes initiated under the Act is the Insanity Defense Reform Act.[2] The Insanity Defense Reform Act substantially alters federal practice with regard to the defense of insanity by providing that:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a *severe* Mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.[3]

According to the legislative history, the concept of "severity" was added to emphasize that nonpsychotic behavior disorders or neuroses do not constitute a defense.[4] The legislative history of this change also reveals that it was Congress' intent to insure that the insanity defense did not improperly resurrect, in the guise of showing some other affirmative defense, the defense of "diminished capacity" or some similarly asserted state of mind which could serve to excuse the charged offense.[5]

The new section concerning the insanity defense also provides that the *defendant* has the burden of proving the defense of insanity by clear and convincing evidence.[6] Congress felt this change was justified because such evidence is "peculiarly available . . . to the defendant" whereas evidence to establish sanity beyond any reasonable doubt is "frequently unavailable to the prosecution."[7]

[1] Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

[2] Insanity Defense Reform Act, Pub. L. No. 98-473, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 2057 (to be codified at 18 U.S.C. §20).

[3] *Id.* (emphasis added).

[4] *Limiting the Insanity Defense*, Hearings Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (1982).

[5] *Id.*

[6] *See supra* text accompanying note 2.

[7] *The Comprehensive Crime Control Act of 1983*, Hearings Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 98th Cong., 1st Sess. 55–56 (1983) (statement of the Department of Justice).

The Insanity Defense Reform Act also amended Federal Rule of Evidence 704[8] by adding the following subdivision limiting the general rule regarding "ultimate" expert opinion:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[9]

According to the legislative history of this amendment,[10] the rationale for precluding ultimate opinion psychiatric testimony extends beyond the insanity defense to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven: "The Committee has fashioned its rule 704 provision to reach all such 'ultimate' issues, e.g. premeditation in homicide cases, or lack of predisposition in entrapment."[11]

Presently, Rule for Courts-Martial 916 still imposes upon the prosecution the burden of establishing the sanity of the accused beyond a reasonable doubt.[12] By operation of Military Rule of Evidence 1102, however, Military Rule of Evidence 704 is now conformed to Federal Rule of Evidence 704 as amended.[13]

Consequently, in all cases involving criminal acts committed after 10 April 1985, in which the accused raises the defense of insanity, expert opinion on the ultimate issue whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto is inadmissible as evidence.

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[8] Fed. R. Evid. 704, before amendment, was identical to Mil. R. Evid. 704 and provided that: "Testimony in the form of an opinion is not objectional because it embraces an ultimate issue to be decided by the trier of fact."

[9] Insanity Defense Reform Act, Pub. L. No. 98-473, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 2067, 2068, adding Fed. R. Evid. 704(b)

[10] *Limiting the Insanity Defense*, Hearings Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. (1982).

[11] *Id.*

[12] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(a)(b),(k). Major Gary Casida, the Army member of the Joint Service Committee on Military Justice reported to TCAP that legislation is pending before Congress which will conform military practice to the changes instituted by the Insanity Defense Reform Act of 1984.

[13] Mil. R. Evid. 1102 provides that: "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 180 days after the effective date of such amendments unless action to the contrary is taken by the President." *See* HQDA Message—Amendment to Mil. R. Evid. 704, *reprinted in* this issue of *The Army Lawyer*.

Reader's Note

The Silent Enemy

[The following reader's note was provided by a trial counsel who wished to remain anonymous. TCAP believes this note to be extremely valuable because, although it represents an unfavorable result to one trial counsel, it stands to save many others from a similar fate]

Recently, I suffered a devastating blow in a case where the accused was charged with distribution of amphetamines. The case developed as follows. On 31 August 1984, the accused was arrested during a combined civilian-military investigation for illicit trafficking of drugs. On 13 September 1984, the accused was ordered by the acting company commander not to go into the company area. This order was based on alleged threats and warnings made to company members by the accused which the commander deemed were deleterious to the morale of the unit. In accordance with the order, the accused was transferred to another work area.

On 18 December 1984, charges were preferred against the accused. On 21 December 1984, an Article 32 hearing was scheduled. The defense then requested a delay of these proceedings until 10 January 1985. Later, the defense further re-

quested that the Article 32 hearing be delayed until 15 January 1985.

On 15 January 1985, the Article 32 hearing was completed and on 31 January 1985 the charges against the accused were referred to trial by general court-martial. On 7 February 1985, the defense requested further delay of the case until 5 March 1985.

At trial, the military judge granted a defense motion to dismiss the charges for lack of "speedy trial." The military judge ruled that the imposition of "conditions on liberty"[1] over the accused by the commander occurred and that the commander's order that the accused remain away from the company constituted pretrial restraint under Rule for Courts-Martial (R.C.M.) 707.

Although there was a full hearing on this matter, during which the commander testified that he ordered the accused to remain away from the company area because he believed the accused constituted a threat to the morale and discipline of the company, the military judge ruled that this order was a condition on liberty. In so ruling, the military judge considered both R.C.M. 304(a)(1) and R.C.M. 304(h).[2] The military judge noted that the commander's order had been given without any explanation of the purported basis of the order (that the accused was a disruptive influence on the unit). The military judge also noted that there was no effort made to correct, counsel, or discipline the accused for hampering work in the unit or causing morale problems. He also noted that there had been no investigation into the truth of statements that the accused had threatened members of the unit nor had there been a review of the decision to place the condition on the accused's liberty.

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[1] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 304(a) provides that "Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, or confinement."

[2] R.C.M. 304(h) provides that "Nothing within this rule prohibits limitations on a servicemember imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons."

Although my argument against this finding did not succeed, I believe it provides considerable insight into this issue. My argument was that a condition on liberty is an order directing a person to do or refrain from doing specified acts and that certainly, this cannot be taken literally. The drafter's discussion of Rule for Courts-Martial 304(a) does not maintain that *every* order is a condition on liberty. An order to participate in physical training, to clean the barracks, although literally meeting the definition of a condition on liberty, cannot be sensibly so construed. One tool to determine the scope of R.C.M. 304(a) is to place it context. Looking at the manual for Courts-Martial as a whole, several important clues to the president's intent are evident.

The heading of R.C.M. 304 suggests that simple restraint or a bald condition is not enough; there must be some relation between the condition and the trial process. The definition of restraint under R.C.M. 304(a) itself suggests that the restraint must relate to both the offense and its ultimate disposition at trial. The discussion to R.C.M. 304(a) gives three examples of conditions on liberty which demonstrate a palpable relationship between the offense charged and the condition on liberty. Also, R.C.M. 304(h) makes even more explicit the need to have orders that restrain a service member even when it is clear that such orders having nothing to do with military justice matters. Under the aegis of this rule, the President demonstrates that a soldier can be validly restrained without having such restraint impact on ongoing trial proceedings.

From these sources, it is clear that the President intended a condition on liberty as defined in R.C.M. 304 to be one imposed with the primary purpose of limiting an accused's liberty as a direct result of an offense, and a valid administrative condition on liberty as one primarily imposed for a valid military purpose unrelated to or only indirectly related to an offense. This analysis has two prongs:

(1) Was the commander actuated by a primary military purpose? This is analogous to the "primary purpose" inspection rule established under Military Rule of Evidence 313*b* A commander should be free to place

valid administrative limits on liberty based on valid military purposes.[3]

(2) Is the valid military purpose sufficiently attenuated so that it is independent of military justice? This causation test appears implicit in R.C.M. 304(h) and embraces the idea found throughout the Manual for Courts-Martial that the offense and the condition on liberty must be closely related.

[3] *See* United States v. Dykes, 6 M.J. 744 (N.M.C.M.R. 1978).

Of course, the major error in this case was not getting to trial sooner. It is also clear that under these circumstances, *any* restriction imposed upon an accused must be known to trial counsel at the outset and must be reviewed to pinpoint the commander's intent. The military judge's ruling in this case makes clear that the commander must communicate his or her intent clearly to the accused whether or not the "restriction" relates to the offense.

As predicted, R.C.M. 304(a), when read in conjunction with R.C.M. 707(a), is trial counsel's 'silent enemy".

The Advocate For Military Defense Counsel

THE ADVOCATE FOR MILITARY DEFENSE COUNSEL

Submitted by the United States Army Defense Appellate Division

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Sentence Proportionality Under Article 66

Captain Audrey H. Liebross
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Sentences adjudged at court-martial are widely disparate for a variety of reasons. Some are valid reasons which directly relate to the type of offense or to the individual, *e.g.*, the severity of the harm inflicted or restitution made for the offense. Some sentences seem disproportionately severe given the circumstances of the case, and seem to have been imposed for reasons unrelated to the offense or the offender. Under these circumstances, defense counsel at trial and on appeal may urge that the individual's sentence be compared to other sentences adjudged for similar offenses by a specific judge or within a given jurisdiction. Article 66 of Uniform Code of Military Justice,[1] which allows the Courts of Military Review to determine facts in reviewing findings and sentences, provides appellate defense counsel with a potentially powerful tool. Yet, as most counsel and judges would readily acknowledge, arguments that sentences are inappropriately severe in comparison with others rarely succeed.

One reason for their high failure rate is the deference that Article 66 pays to triers of fact.

[1] 10 U.S.C. § 866 (1982) [hereinafter cited as UCMJ].

Appellate tribunals are frequently reminded that the military judge and court members saw and heard the witnesses.[2] Another reason, however, is undoubtedly the refusal of appellate courts to compare sentences to those in unrelated cases. This article examines the history of the noncomparison doctrine and urges that it be overruled.

In the mid–1950s, the boards of review decided that sentences should be imposed and reviewed without formal comparison to those sentences imposed for similar offenses.[3] In 1959, the Court of Military Appeals adopted a comparable rule in *United States v. Mamaluy*.[4] Although *Mamaluy* is frequently cited in denying an appellant a desired sentence comparison,[5] it differed factually from more recent sentence comparison cases. In *Mamaluy*, the law officer instructed the members that they could adjudge a sentence based in part on their knowledge of other sentences imposed in the command. The Court of Military Appeals held that this comparison violated the appellant's rights. There is a crucial distinction between comparison by members who engage in jury-room evidence-gathering and sentence comparison following court-martial. The courts of military review and Court of Military Appeals have held that sentence comparison is forbidden except in closely related cases.,[6] As a result, an appellant cannot succeed with a claim that his or her sentence is too severe when compared to the usual military sentence for similar offenses.

The rule of noncomparison made sense in an era when there was no way to accumulate statistics except through a laborious process of examining convening orders. Unless a military agency happened to sort its statistics on the basis of the particular determinant desired to be compared (such as by jurisdiction, military judge, or offense), one desiring to engage in sentence comparison could not be sure of having gathered all of the relevant data. Because the Supreme Court considered sentence comparison unnecessary for noncapital cases,[7] the military rule of noncomparison under Article 66 was a prudent one.

In an era of routine use of computers, such a rule cannot be justified on the basis of procedural unwieldiness. Surely, any clerk of court's office that has not computerized its data can be expected to do so soon. Furthermore, the constitutional rule has changed. Now, proportionality analysis, and its concomitant requirement for sentence comparison, are not required in death penalty cases.[8] However, they are indeed required in non-capital cases where the appellant has raised an eighth amendment claim.[9]

The Court of Military Appeals is currently in the process of considering the question of sentence comparison. In *United States v. Ballard*,[10] the court ordered oral argument on the question of "whether defense appellate exhibits A and B are admissible in light of *Solem v. Helm* and *Pulley v. Harris*." Defense Appellate Exhibits A and B consisted of eight convening orders in other drug cases tried by the same military judge sitting without members.[11] Ballard argued that his trial judge "routinely imposes severe sentences in drug cases."[12]

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[2] UCMJ art. 66(c).

[3] *E.g.*, United States v. Johnson, 28 C.M.R. 662, 686-87 (N.B.R. 1959) (decision upon motion for reconsideration); United States v. Dowling, 18 C.M.R. 670, 678-79 (A.F.B.R. 1954), *petition denied in part and granted and withdrawn in part*, 18 M.J. 332, 333 (1955).

[4] 10 U.S.C.M.A. 102, 27 C.M.R. 176 (1959).

[5] *E.g.*, United States v. Snelling, 14 M.J. 267 (C.M.A. 1982); United States v. Olinger, 12 M.J. 458 (C.M.A. 1982).

[6] *E.g.*, United States v. Ballard, CM 446281 (A.C.M.R. 21 Dec. 1984), *appeal docketed*, 19 M.J. 310 (C.M.A. 1985); *supra* note 5

[7] Rummel v. Estelle, 445 U.S. 263, 272 (1980).

[8] Pulley v. Harris, 104 S. Ct. 871 (1984).

[9] Solem v. Helm, 103 S. Ct. 3001 (1983).

[10] CM 446281, No. 51,824/AR (C.M.A. 9 Mmay 1985) (ordering oral argument). At this writing, the court has not granted the appellant's petition for review, even though it has heard argument in the case.

[11] Motion to Admit Defense Appellate Exhibits, United States v. Ballard, CM 446281, No. 51,824/AR (filed in Court of Military Appeals, 18 Mar. 1985). Copies of all pleadings filed before the Court of Military Appeals are available from the Clerk of Court at a cost of ten cents per page.

[12] United States v. Ballard, CM 446281, slip op. at 1.

Before the Army Court of Military Review, Ballard had sought judicial notice of the sentences contained in Defense Appellate Exhibit A. That court refused his request:

> Serious crimes may well warrant serious penalties. In our system of jurisprudence, the concept of individualized sentencing fortunately still prevails. Convicted offenders should ideally receive appropriate punishments for their crimes. An appropriate punishment takes into account such factors as the gravamen and circumstances of the offense(s) and the background of the accused. Thus, the sentencing authority must carefully weigh these factors, including all relevant matters of record in extenuation, mitigation, and aggravation.[13]

The court implicitly held unrelated sentences to be irrelevant. It proceeded to perform a traditional sentence appropriateness analysis and affirmed the adjudged sentence, which included a bad-conduct discharge, confinement at hard labor for five years and six months, total forfeitures, and reduction to the grade of Private E–1 for the offense of distribution of 0.7 grams of cocaine and use of cocaine.[14]

Ballard was not the first time in recent months that the issue of sentence comparison has confronted the Court of Military Appeals. In *United States v. Burrow*,[15] Chief Judge Everett and Judge Fletcher ordered, over Judge Cook's dissent, a remand in a case where the Army Court of Military Review had refused to admit a table of sentences imposed in the same jurisdiction for similar offenses. The Court of Military Appeals ordered the Army court to "review the case in light of said exhibit."[16] On the other hand, in *United States v. Jennings*,[17] the Court of Military Appeals denied a petition that presented the same issue as *Burrow* and *Ballard*.[18]

The remainder of this article will explore the question of whether the court of Military Appeals should hold that Article 66 requires the type of sentence comparison employed in *Solem v. Helm*.[19]

In *Solem v. Helm*, the Supreme Court held that a defendant sentenced to life imprisonment without possibility of parole was entitled to proportionality analysis. It established a scheme for analyzing sentences under the eighth amendment: "[A] court's proportionality analysis ... should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[20]

In *Pulley v. Harris*,[21] the Court held that the eighth amendment does not require courts to engage in proportionality analysis when a defendant has been sentenced to death. At first glance, *Helm* and *Harris* seem to contradict each other. However, they can be harmonized.

Harris cited *Helm* in acknowledging that the Court had "occasionally struck down punishments as inherently disproportionate ... when imposed for a particular crime or category of crime."[22] Yet, *Harris* held that a state court need not compare different cases to decide whether a death sentence is disproportionate. Thus, there is an apparent contradiction: life imprisonment may be found disproportionate under the eighth amendment while a sentence of death need not even be compared to other sentences.

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[13] *Id.* at 2. The court also cited *Olinger* and *Snelling*. *Id.* at 1–2.

[14] *Id.* at 1–2.

[15] 18 M.J. 419 (C.M.A. 1984) (sum. disp.). The remand order does not mention the sentence comparison issue. However, the pleadings are available from the Clerk of Court.

[16] *Id.*

[17] CM 445121 (A.C.M.R. 31 Aug. 1984), *petition denied*, 19 M.J. 323 (C.M.A. 1985).

[18] Once again, only the pleadings, and not the decision or denial of the petition, mention the issue of sentence comparison.

[19] 103 S. Ct. 3001.

[20] *Id.* at 3010–11.

[21] 104 S. Ct. 871.

[22] 104 S. Ct. at 875

The resolution of this seeming contradiction may lie in the presence of other safeguards in capital cases. Defendants have the right to be sentenced by juries that perform their task with adequate guidelines.[23] A jury's discretion must be guided in order to assure that the death penalty is not applied arbitrarily.[24]

Justice Stevens, concurring in the result in *Pulley v. Harris*, emphasized the "essential role" of appellate review in "eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes...."[25]

Reading *Harris* and *Helm* together, one can conclude that proportionality review, although not required in death penalty cases, is constitutionally acceptable if a jurisdiction chooses to adopt it, either legislatively or by judicial decree.[26] In noncapital cases, it may be required unless there are other means similar to those in capital cases by which an appellate court can perform an eighth amendment review.[27]

The federal system is moving in the direction of uniformity in prison sentences. Five circuits have performed proportionality analyses under *Solem v. Helm*. In *United States v. Garcia*,[28] the Second Circuit reduced a nine-year sentence for contempt of court to four years, *even though there was no eighth amendment claim*. In *United States v. Ortiz*,[29] the same circuit performed a detailed analysis of proportionality, including the expectation of parole. The court affirmed ten years of confinement and ten years of special parole for a recidivist heroin distributor. In *United States v. Fishbach and Moore, Inc.*,[30] the Third Circuit affirmed a fine of one million dollars to a corporate offender in a Sherman Act prosecution. The court did note, however, appellant's statistical evidence of sentences in unrelated cases. In *Whitemore v. Maggio*,[31] the Fifth Circuit remanded for consideration of the proportionality issue where the defendant had received 125 years' imprisonment for two armed robberies. However, the court emphasized the lack of possibility of parole.

In *United States v. Serhant*,[32] the Seventh Circuit affirmed a fifteen-year sentence in a guilty plea to four counts of mail fraud, after noting the trial court's discretion and analyzing nationwide statistics of similarly convicted defendants. In *United States v. Darby*,[33] the Eleventh Circuit affirmed sixty-year prison terms for the operators of a huge drug importation operation. The court noted the trial judge's discretion and the imposition of similar sentences in other courts for similar offenses.

Federal defendants will soon receive the benefit of proportionality analysis without having to argue that their sentences are unconstitutionally severe. Beginning 1 November 1986, federal judges must apply the sentencing guidelines which the United States Parole Commission will establish.[34] In addition, the statute specifically requires sentencing judges to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[35] The sentencing guidelines will also solve for federal defendants the problem of the personal predilections of judges which cause them to impose severe sentence for certain categories of offenses or offenders. Judges will no longer be permitted to assign their own arbitrary sentencing floors. Instead, they will be required to use established limits

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[23] *Id.* at 878.

[24] *Id.* at 881.

[25] *Id.* at 881 (Stevens, J., concurring in part and in the judgment).

[26] *Id.* at 876.

[27] *See* Solem v. Helm, 103 S. Ct. at 3009.

[28] 755 F.2d 984 (2d Cir. 1985).

[29] 742 F.2d 712 (2d Cir.), *cert. denied*, 105, S. Ct. 573 (1984).

[30] 750 F.2d 1183, 1192–93 (3d Cir. 1984).

[31] 742 F.2d 230, 233–44 (5th Cir. 1984).

[32] 740 F.2d 548, 554–55 (7th Cir. 1984).

[33] 744 F.2d 1508, 1525–29 (11th Cir. 1984).

[34] 18 U.S.C. § 3553(a)(4), (b) (1982).

[35] 18 U.S.C. § 3553(a)(6) (1982).

which consider the specific characteristics of both the offense and offender.[36]

The new statutory scheme does not apply to courts-martial. Indeed, the military has special problems which may render a similar scheme impractical. Chief among these is court-member sentencing.[37] Convening authorities and the courts of military review, however, have to act on member-imposed sentences just as they do on those imposed by a military judge.[38] Convening authorities and appellate judges surely are aware of the types of sentences handed down in other cases.

Federal appellate courts are supposed to defer to trial courts because federal appellate tribunals possess no fact-finding powers.[39] Nevertheless, the *Helm* Court specifically discussed comparison to other sentences in the same jurisdiction and to sentences in other jurisdiction.[40] If courts with no fact-finding power must compare sentences when an eighth amendment question arises, then it makes sense for a court of military review, which has the right and the duty to examine sentence appropriateness under Article 66, to perform similar comparisons. Indeed, the Supreme Court itself recognized that an eighth amendment analysis is less comprehensive than that of a court with statutory power to reexamine sentences:

> [We] do not adopt or imply approval of a general rule of appellate review of sentences. *Absent specific authority*, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.... In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.[41]

If the Court of Military Appeals holds that Article 66 does not require proportionality analysis, it will have established a paradox: both the Court of Military Appeals and courts of military review already have the power to compare sentences when a sentence is alleged to be unconstitutionally severe.[42] Yet, Article 66 gives a broader grant of power than does Article 67(d). If it does not read the *Solem v. Helm* scheme into Article 66, the court will be reserving to itself, instead of the fact-finding courts of military review, the real power to overturn sentences. Furthermore, such a decision would require appellate counsel and the courts of military review to divide sentence severity into two issues instead of one: the traditional question of sentence appropriateness and the constitutional question of proportionality. Under a more practical approach, the eighth amendment issue would continue to be subsumed in a sentence appropriateness analysis.

From the time of *Mamaluy* to the Army Court of Military Review's decision in *Ballard*, appellate military courts have feared that sentence comparison will destroy the concept of individualized sentencing. Yet, not even the new federal guidelines will do that because the Sentencing Commission must consider the characteristics of both offense and offender in drafting the guidelines. Furthermore, in a case such as Ballard's, who objected to the military judge's routine imposition of severe sentences,[43] only sentence comparison can demonstrate that the accused was sentenced according to a scheme and not according to individual characteristics.

Finally, the Court of Military Appeals can glean support for sentence comparison from the legislative history of the UCMJ. Congress intended that Article 66 and Article 67(g)(1), which

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[36] 28 U.S.C. § 994(c), (d) (1982).

[37] UCMJ art. 52(b).

[38] UCMJ art. 66.

[39] Solem v. Helm, 103 S. Ct. at 3009.

[40] *Id.* at 3010.

[41] *Id.* at 3009 n.16 (emphasis added).

[42] *See generally Solem v. Helm.*

[43] *Id.* slip op. at 1–2.

provides for an annual review of sentencing policies, "establish uniformity of sentences throughout the armed forces."[44] The Court of Military Appeals in *Olinger* decided that Congress desired relative and not mathematical uniformity.[45] The concept, however, of what constitutes uniform sentencing has changed in the last twenty-five years. In an era when the desire for civilian sentence uniformity is so great that Congress has mandated a guideline scheme to remove most judicial sentencing discretion, it is difficult for the armed forces to justify a rule of almost unfettered discretion. Military courts would be wise to interpret Article 66 as requiring sentence comparisons. Otherwise, the risk is that Congress will intervene to vest sole sentencing power in judges bound by rigid guidelines.

Although sentence comparison as envisioned by the *Solem v. Helm* Court is a uniquely appellate endeavor, trial defense counsel can lay the foundation for a successful challenge under Article 66 or the eighth amendment. Defense attorneys who keep track of sentence imposed in their jurisdictions can list them in their post-trial submissions[46] to support an argument than an anomalous sentence is too severe. Even if the staff judge advocate urges the convening authority to ignore evidence of other sentences, trial defense counsel will have provided appellate defense counsel with the evidence upon which to base an appeal.

When the problem is not an anomalous sentence but a regular course of harsh sentences on the part of a particular military judge, the best trial strategy is one of prevention. Trial before members may be less of a risk than trial before a judge with a record of consistently severe sentences for a particular offense.

If an accused must avoid trial by members, the military judge should be challenged for cause on the basis of an inelastic attitude. Such a challenge would almost certainly require appellate courts to compare the sentences of the judge in question to the sentences imposed elsewhere in the same branch of the service. This approach will probably alienate a judge who will nonetheless sit to hear the case. Therefore, caution must be employed in using this approach. On the other hand, a judge who denies the challenge for inelastic attitude may avoid a severe sentence to disprove the charge.

Defense counsel are wise to inform themselves of the sentencing reputation of the judges before whom they appear. This suggestion appears simplistic until one considers that both military judges and defense counsel often appear far from their usual jurisdictions to try cases and may often arrive with scant notice.

Whether or not the Court of Military Appeals decides that Article 66 permits sentence comparison in unrelated cases, trial defense counsel are urged to participate in the accumulation of statistical data on sentencing. Such data can assist a client is asserting an eighth amendment claim when faced with an anomalous, severe sentence. When a sentence seems completely out-of-line, this sentencing information may represent an accused's best hope for sentencing relief.

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[44] H.R. Rep. No. 491, 81st Cong., 2d Sess. 31–32 (1949).

[45] Olinger, 12 M.J. at 461 (quoting United States v. Judd, 11 C.M.A. 164, 170; 28 C.M.R. 388, 394 (1960) (Ferguson, J., concurring in the result)).

[46] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1105.

Automatic Teller Fraud and Multiplicity

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Technology has not only created new conveniences for the consumer, it has also created new criminal opportunities. Many banks now offer ready access to cash from Automatic Teller machines (ATM). The number of cases involving larceny of cash from these machines has been increasing dramatically. The Defense Appellate Division has raised a number of multiplicity issues on appeal because of attempts by prosecutors to divide a single transaction involving abuse of an ATM card into separate specifications.

Recent ATM fraud cases argued before the Army Court of Military Review have raised three common multiplicity issues: charging the use of different accounts as separate offenses; charging the theft of an ATM card separate from the theft of funds; and charging more than one withdrawal from the same account as separate offenses.

A case illustrating the first type of multiplicious charging involved an accused was a mail room clerk. He removed ATM cards from the mails and used them for several visits to one machine, where he withdrew money from different accounts in close sequence. The withdrawals were within minutes of each other, but were initially charged in separate specifications alleging the account holders as separate victims.[1]

The second type of multiplicious charging is probably the most common. The prosecutor elects to charge the theft of the ATM card itself as a separate offense. Clearly this division of the charges is possible in virtually any ATM larceny since the perpetrator must first secure an ATM card to accomplish his fraud. Three reported cases have addressed this type of multiplicious charging.[2]

The final type of multiplicious charging involves separate withdrawals from the same account in one functional transaction. Since most ATMs limit the amount that may be withdrawn at any one time, an offender often has to make several withdrawals to obtain the amount sought. Depending upon the limits of a given machine, these withdrawals could be within close sequence. For example, in one case an accused and his accomplice made withdrawals before and after midnight so that the machine would reset and allow a withdrawal for the next day.[3]

In all three types of multiplicious charging, defense strategy should be to identify ATM larceny as fraud. Defense counsel must understand the legal and factual basis for this theory and be prepared to communicate it to the military judge. Recognition of larceny by fraud is the primary defense tool for imposing logical limits on the the description of the crime.

The general approach is to show how the various charged actions constitute an integrated transaction, as explained in the frequently cited

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[1] United States v. Aquino, CM 446416 (A.C.M.R. 16 May 1985) (argued).

[2] United States v. Jobes, 20 M.J. 506 (A.F.C.M.R. 1985); United States v. Abendschein, 19 M.J. 619 (A.C.M.R. 1984); United States v. Pulliam, 17 M.J. 1066 (A.F.C.M.R. 1984).

[3] United States v. Younan, CM 446919 (25th Inf. Div. 24 Jan. 1985) (multiplicity not assigned as error on appeal).

case of *United States v. Baker*.[4] The charges and specifications should accurately reflect the degree of an accused's criminal behavior.[5] By characterizing ATM theft as fraud, the crime is correctly identified as an integrated transaction that usually requires careful planning and a number of preparatory actions.

The Uniform Code of Military Justice (UCMJ) uses the term "defraud" in describing larceny and the explanation to Article 121 of the UCMJ notes that common law fraud has been included in the definition of larceny.[6] By necessity, theft from an ATM is fraudulent in nature. The offender must first secure two separate items, the ATM card and the Personal Identification Number (PIN). The PIN is often obtained by some sort of trick or deception. Once these two items are secured, the offender must then misrepresent himself to the ATM. The process of deception is no different than the presentation of a forged instrument. The human teller relies upon signature and visual identification to verify the transaction, while the ATM relies upon the card and PIN. The comparison to a commercial checking transaction is appropriate. When faced with multiplied charges in an ATM fraud case, this comparison is very helpful because the bank is the victim of the fraud, not the account holder. Just as in an ordinary checking transaction, the bank is required to know its endorser.

United States v. Holliman[7] supports the consolidation of charges and specifications when applied to a theory of fraud. Though *Hollimon* involved communication of a threat to accomplish a rape, it has been used by practitioners in analyzing a number of different crimes. The key language in *Hollimon* identifies the threat as an "integral means" by which the rape was accomplished.[8] Perhaps more clearly than *Baker*, this language provides a tool for discriminating among various actions involved in criminal conduct. When applied to the theory of ATM fraud, the impact of identifying an action as the integral means of achieving a criminal object is significant. Attempts by the government to charge the action as a separate offense must not only overcome its identification as the integral means used to accomplish a criminal goal, but must also overcome the theory of fraud as a whole.

Congress has acted to define the relationship between the bank and the consumer in ATM transactions. The Electronic Fund Transfer Act substantially confirms the relationship which existed prior to the introduction of ATM technology.[9] As with ordinary checking transactions, the bank runs the risk of falling victim to fraud. The consumer incurs no liability from an unauthorized ATM transaction.[10] The financial institution has the burden of proving the consumer is liable for the loss, even to the extent of a $50.00 limit on liability as provided in the Act.[11] Consistent with spirit of the Act, the Court of Appeals, for the 7th Circuit in *Illinois ex. rel. Lignoul v. Continental Bank & Trust*[12]

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[4] 14 M.J. 361, 366 (C.M.A. 1983).

[5] United States v. Harclerode, 17 M.J. 981, 984 (A.C.M.R. 1984).

[6] 10 U.S.C. § 921(a) (1982); Manual for Courts-Martial, United States, 1984, para. 46(c)(1)(a) [hereinafter cited as MCM, 1984]; *see* United States v. Escobar, 7 M.J. 197, 198 (C.M.A. 1979).

[7] 16 M.J. 164 (C.M.A. 1983).

[8] *Id.* at 167.

[9] 15 U.S.C. § 1693g (1982).

[10] 15 U.S.C. § 1693g (e) (1982).

[11] 15 U.S.C. § 1693g(b) (1982). *See* Ognibene v. Citibank, 446 N.Y.S. 2d 845, 847; 112 Misc. 2d 219 (Civ. Ct. 1981) (to be entitled to impose even limited liability on the consumer the bank must first prove conditions of consumer liability have been met and disclosures made).

[12] 536 F.2d 176, 178 (7th Cir. 1976).

held ATM transactions to be the functional equivalent of checking account transactions.

Charging the use of different accounts as separate offenses

The determination that the bank rather than the account holder is the victim of ATM fraud is critical in resisting this type of multiplicious charging. The identity of the victim may be used by the government as the basis for separate specifications. The attempt to multiply charges based on the identity of the victim has been given some support in military law[13] by the test for multiplicity stated in *Blockburger v. United States*.[14] The *Blockburger* test has been interpreted to mean that the identity of separate victims provides sufficient additional facts to justify multiple charges.[15] However, as the bank is the victim of ATM fraud, this attempt to use the *Blockburger* analysis for multiplying charges has no basis in fact.

As in ordinary checking transactions, the financial institution is the victim of fraud and forgery.[16] The Court of Military Appeals has confirmed that it is the institution or merchant accepting a fraudulent instrument that is the victim of that crime.[17] The court specifically rejected the notion that inconvenience to the account holder created status as a victim.[18]

Defense counsel should argue that contemporaneous thefts from separate accounts are analogous to larceny of several articles from the same room but belonging to different people. Government counsel have argued that use of several accounts in an ATM fraud constitutes separate "entries" sufficient for separate specifications.[19] This is nothing more than a restatement of the idea that the identity of separate victims provides sufficient basis for multiple charges. Considering that the bank is the actual victim, this argument is factually incorrect. Also, by allowing separate accounts to be the basis of separate charges, the rule in military law defining the nature of larceny is evaded. A multiple article larceny with unity of time and place has been defined by the Manual for Courts-Martial to be just one crime.[20]

Charging the theft of an ATM card as a separate offense

In the second type of multiplicious charging frequently encountered, the government charges the theft of an ATM card itself as a separate larceny. The Air Force and Army Courts of Military Review have considered this problem and produced brief, conflicting opinions: *United States v. Pulliam* and *United States v. Abendschein*.[21] Due to their brevity, neither opinion provides helpful guidance or reasoning for the holding given.

The Air Force Court of Military Review recently attacked this problem in an articulate fashion. In *United States v. Jobes*,[22] the court decided that the sole basis for determining whether the theft of an ATM card may be charged separately is the time and place of the theft in relation to other culpable acts. The court relied heavily upon *United States v. Burney*[23] to conclude that a crime should be analyzed by determining whether the actor was carried along by an "insistent flow of events," rather than whether a series of actions were motivated by a "single impulse."[24]

This decision implicitly rejected the approach of *Baker* and its progeny which analyzed a crime based upon whether a series of actions can fairly be stated as an integrated transaction. The fact that a single impulse motivated a series of actions may be sufficient under *Baker* or *Hollimon* to require that an offender be convicted only one

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[13] MCM, 1984, Rule for Courts-Martial 1003(c)(1)(C).

[14] 284 U.S. 299 (1932).

[15] Brown v. Ohio, 431 U.S. 161, 165 (1977); State v. Harris, 78 Wash. 2d 894, 480 P.2d 484 (1971).

[16] U.S.C. §§ 4–401(1); 3–418 cmt 1

[17] United States v. Uhlman, 1 M.J. 419, 420 (C.M.A. 1976). *modified on other grounds*, United States v. Lockwood, 15 M.J. 1, 9 (C.M.A. 1983). The court in Uhlman acknowledged the Uniform Commercial Code principle cited in note 16.

[18] *Id.*

[19] *United States v. Aquino.*

[20] MCM, 1984, para. 46(c)(h)(ii).

[21] 19 M.J. 619 (A.C.M.R. 1984).

[22] 20 M.J. 506, 508 (A.F.C.M.R. 1985).

[23] 21 C.M.A. 71, 44 C.M.R. 125 (1971).

[24] 20 M.J. at 510.

crime. Unfortunately, *Jobes* does not address the reasoning of *Banker* or *Hollimon* and relies upon earlier decisions of the Court of Military Appeals.

Not surprisingly, *Jobes* endorses the decision of the Army court *Abendschein* which also held that an actor must be compelled by the irresistible flow of events to be charged with only one crime.[25] Both of these cases are excellent examples of how some courts and prosecutors are attempting to impose the civilian version of the *Blockburger* test upon military law. Fortunately, *Jobes* is being considered by the Court of Military Appeals for remand to the Air Force Court of Military Review for a rehearing *en banc*.

If a practitioner is called upon to explain *Jobes* to a military judge, he or she should emphasize that it is in total conflict with *Pulliam*, an opinion of the same court; that the Court of Military Appeals may remand it for an *en banc* rehearing; that it implicitly conflicts with the integrated transaction test of *Baker* and *Hollimon;* and that it implies that no crime could ever be described as a fraud. *Jobes* underscores the need for defense attorneys to characterized ATM larceny as fraud. otherwise, proponents of *Jobes'* reasoning will succeed in splintering the components of a fraud into many different charges.

This second area of multiplicious charging can also be litigated with cases involving the theft of checks subsequently forged and uttered. To use these cases, defense counsel should cite *Lignoul* to show that ATM and checking transactions are functional equivalents.[26] In two unpublished opinions, the Army Court of Military Review held that the charge of theft of checks was multiplicious with a subsequent charge of forgery of the same check for purposes of both findings and sentence.[27] There has, however, also been a contrary opinion issued by the Army court.[28] Considering the close factual relationship of ATM and checking transactions, a good argument can be made that the charge of theft of an ATM card should also be consolidated with its subsequent use.

When viewed as a fraud, the theft of an ATM card is merely a preparatory act necessary to commit a fraud. Defense counsel arguing this issue can refer to *United States v. Sievers*[29] where the nature of larceny by fraud was defined broadly. In *Sievers*, the Court of Military Appeals took an expanded view of a criminal transaction to assert military jurisdiction over a continuing offense. The definition of larceny by fraud developed in that case should be equally applicable to multiplicity issues.

Charging withdrawals from the same account as separate offenses

The litigation problems of this third type of multiplicious charging are similar to those of the first type. Withdrawals may occur over a period of days or a period of minutes. In *Sievers*, the fraud extended over a period of days, which makes it directly applicable to this problem. Another useful case is *United States v. Allen*,[30] in which the accused wrote worthless checks to obtain airline tickets. There the court held that the making of the worthless checks was larceny by false pretenses which merged with the subsequent larceny of the tickets. *Allen* is not only helpful when theft of the ATM card has been charged separately, but also when the government has tried to sever a series of related acts into different charges. *Allen* stresses that acts in preparation are to be consolidated with the target offense. The reasoning in *Allen* ties in closely with *Hollimon* and it can be used to emphasize the unitary nature of a fraud. ATM fraud not only requires a series of preparatory acts, but often requires several visits to a machine for an offender to secure the funds sought. Machines have various limits on the amount that may be withdrawn at any time, which motivates an offender to return for several withdrawals.

Applying the theory of unity of time and place to these cases can be quite challenging. Defense

[25] *Id.* at 513.

[26] 536 F.2d at 178.

[27] United States v. Cromie, CM 446563 (A.C.M.R. 26 Mar. 1985) (unpub.); United States v. Heyliger, CM 446313 (A.C.M.R. 22 Jan. 1985) (unpub.).

[28] United States v. Roberts, CM 446498 (A.C.M.R. 3 Apr. 1985) (unpub).

[29] 8 M.J. 63 (C.M.A. 1979).

[30] 16 M.J. 395, 396 (C.M.A. 1983).

counsel and the military judge must find a practical way to define the conceptual limit of what constitutes one transaction. In any event, the government should not be allowed to characterize one visit to an ATM or one episode involving several withdrawals as more than one offense. The fraud examined in *Sievers* extended over a period of several days.[31] In *United States v. Swigert*,[32] the accused broke into a barracks room and stole $$20.00. He then returned to the room during a forty-five minute period after the original entry and stole $40.00 he had noticed in the room during his first visit. The Court of Military Appeals held the two asportations within the forty-five minute period constituted just one offense.

The cases cited above provide a sound basis for defense counsel to resist multiplication of charges against a client accused of ATM fraud. In the last type of multiplicious charging, where the government charges different withdrawals from the same account as separate offense, the problem of precise definition of a transaction depends upon the specific facts of a case. In this situation, and in others, defense counsel will succeed because of their ability to marshall the facts available. The case law in this novel area of multiplicity is helpful but provides only limited guidance for litigation.

When confronted by any of the three types of multiplicious charging discussed, defense counsel must succeed in communicating to the military judge that ATM thefts are by necessity a fraud, and that the victim of the fraud is not the account holder but the bank. The issue can be raised through a bill of particulars to challenge the identity of the victim. Defense counsel should establish the functional equivalence between ATM transactions and other check transactions. The fact that these transactions are nearly identical provides a foundation for the use of cases involving forgery, such as *Allen*.

If defense counsel establishes fraud as the gravamen of an ATM larceny, it should be possible to limit multiplied charges through an accurate description of the transaction. The process of analyzing how that description is applied to the given facts will always be difficult, but counsel will be more successful once the proper foundation has been laid.

[31] 8 M.J. at 65.

[32] 8 C.M.A. 468, 24 C.M.R. 278 (1957).

HQDA Message—Amendment to Mil. R. Evid. 704

081553Z May 85

DA WASHDC DAJA–CL

For SJA/JA/Mil Judge/Legal Counsel/ Professor of Law, USMA

SUBJ: Amendment to Mil. R. Evid. 704

A. P.L. No. 98–473, Chapter IV, § 406.

B. Fed. R. Evid. 704

C. Mil. R. Evid. 1102, MCM, 1984.

D. Mil. R. Evid. 704, MCM, 1984.

1. Ref A, which became law on 12 Oct 84, amended Ref B, as follows:

Rule 704. Opinion on Ultimate Issue.

(A) Except as provided in subdivision (B), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(B) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.

2. Ref C provides that amendments to the Fed. R. Evid. apply to the Mil. R. Evid. 180 days after the effective date of such amendments unless action to the contrary is taken by the President. In this case, no contrary action has been taken. Therefore, the amended Fed. R. Evid. 704 became applicable under Mil. R. Evid. 704 on 10 Apr 85.

3. This amendment, modified for military terminology, will be printed in the next change to MCM, 1984.

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

The President's Tax Reform Proposal: Potential Impact and Planning Opportunities

The following information was provided on 10 June 1985 by Lieutenant Colonel Matt C. C. Bristol, III, Chief, Preventive Law and Legal Aid Group, Office of The Judge Advocate General, USAF:

There is a famous line from an old Woody Allen Movie that "the future isn't what is used to be." And so it is with the federal income tax. This item's purpose is to highlight some of the proposed tax changes of interest to our military clients and their families and to suggest planning strategies that could maximize after-tax income both for the current tax year and under the President's proposed changes (most of which would be effective 1 January 1986).

It is always difficult to judge what is "simple" and what is "fair." Sometimes fairness requires complexity (as in the case of grandfathering rules). Some of our clients who were tired of being in the darkness of complicated tax rules, and who thought they saw tax reform as a faint light at the end of the tunnel, may discover that the faint light turned out to be a train. It is, like any other tax proposal, a mix of good news and potential pitfalls:

Military Allowances and Benefits

The President's proposal does *not* include Treasury's earlier suggestion that nontaxable allowances such as BAQ and BAS be taxed. Nor would it subject "in-kind" benefits such as medical care or exchange privileges to taxation. It does not address, however, and therefore leaves open, the issue of whether military personnel living in their own homes will receive reduced interest deductions to the extent that total housing costs are offset by nontaxable quarters allowances for tax years after 1986. Several current bills seek to permanently preclude the IRS from using these allowances as a basis for disallowing any portion of an otherwise deductible home mortgage interest expense.

Charitable Contributions

The proposal will accellerate the phase-out of the 1981 tax law that authorized limited deductions by nonitemizers. The current rules for 1985 will let taxpayers deduct 50 cents of every dollar contributed to charity, with no total dollar limitation (recall that in 1984 the limit was 25% of the first $300 of contributions). But for the President's proposal, nonitemizers in 1986 could have deducted 100% of *all* charitable gifts they made. Since other elements of the proposal will bring many more taxpayers under the standard deduction beginning in 1986, you should consider accelerating your charitable contributions in 1985. Give as much as you can afford to give now, while you can still deduct 50 cents on the dollar. If necessary, borrow money to generate funds to give now what you would ordinarily have given over the next several years. Watch the proposal's progress closely, however, as you will have a clearer picture this December on whether the current law's unlimited charitable gift deductions for 1986 will be allowed.

Ceremonial Uniforms

Personnel required by regulation to buy ceremonial uniforms, and who wish to preserve the option of claiming an itemized deduction for their cost (on the theory that these uniforms are unique items that do not take the place of, or serve as a military counterpart to, any type of civilian clothing) should take the plunge before 31 December 1985. The President's proposal limits, as of 1 January 1986, the amount of all such "miscellaneous itemized deductions" (which includes uniforms, unreimbursed employee business expenses, professional dues and subscriptions, educational expenses, employment agency fees, gambling losses, safe deposit box rentals, and tax return preparation fees, plus all other itemized deductions *except* medical, charitable gifts, interest, taxes, theft and casulty losses) to those expenses which, in the aggregate, exceed one percent of adjusted gross income. In other words, taxpayers would get no deduction for any of these items unless and only to the extent that the sum of all of them exceeds one percent of adjusted gross income (AGI). Another suggestion:

Try to prepay as many of these miscellaneous itemized deductions as possible.

More on Unreimbursed Employee Business Expenses

Starting in 1986, nonitemizers would no longer be able to deduct expenses which exceed government reimbursment—this will apply to both TDY expenses and official entertainment expenses. Nonitemizers who receive Personal Money Allowances will, in effect, have no direct offset against such income. Itemizers, as stated above, will get a deduction only to the extent total miscellaneous deductions exceed one percent of AGI. None of this will change the rules concerning moving expenses; so while that old friend the 2106 will be out, the 3903 remains in the tax form book. Moving expenses in excess of reimbursement will continue to be deductible, whether one uses the standard deduction or itemizes.

State and Local Income Tax and Property Tax

Personal (as opposed to business) deductions for these taxes would end 31 December 1985. Consider prepaying them, or at least getting your check in the mail before 1 January 1986. The same applies to state sales taxes. Buy that new car or boat before the end of the year so you can deduct the sales tax (as you know, the Soldiers' and Sailors' Civil Relief Act provides no protection from sales or use taxes).

Deductibility of Interest

Starting in 1986, a cap would be placed on personal deduction of interest expenses. The transition rules are fairly complex, but you can count on being able to fully deduct home mortgage interest (to the extent the debt does not exceed the fair market value) on your principal residence, *plus* the first $5,000 ($2,500 in the case of married person filing a separate return) of any additional personal interest expense (such as on a car loan, charge account, or vacation home), *plus* an amount equal to the sum of certain investment income (dividends, interest earned during the tax year, capital gain distributions, distributive share of limited partnership income and the like). This new ceiling on personal interest deductions would not apply to or affect Schedule E interest such as that which you deduct on a house rented to another; also, on the Schedule E you can continue to deduct all the interest paid, local property taxes, and other similar expenses incurred in the production of income. Several possible planning strategies seem sensible in respect to these proposed limits on personal interest deductions: (1) consider paying off the mortgage on your vacation home by refinancing the mortgage on your principal residence; (2) consider refinancing the mortgage on you principal residence to general funds for you childrens' college expenses (because interest on education loans may not be fully deductible because of the cap); and, (3) consider converting a vacation home to income producing property by renting it out during portions of the year that you do not plan to use it. There is no grandfather clause for interest on assets purchased before the proposal's effective date, so accellerating the schedule to purchase a vacation or other second home is not likely to be a fruitful enterprise. Of course, Congress could add a grandfather provision.

Life Insurance and Annuities as "Investments"

The investment component of nonterm life insurance and/or annuity policies, also known as the "inside build-up," is about to lose its tax sheltered status. If you have been considering the purchase of universal or variable life insurance, do it before the two tax committees in Congress approve the change. The proposal would be effective for all inside build-up credited on or after 1 January 1986 to policies issued on or after the date of adoption of this specific proposal. Here is what would happen in the case of new policies that miss the proposed deadline: policy owners would have to report, as interest income, any increase during a taxable year in the amount by which the policy's cash surrender value exceeds the policyholder's "investment in the contract." This latter phrase means gross premiums, minus policy dividends, minus the aggregate cost of renewable term insurance under the policy. In the case of variable life policies, the policyholder would be treated as owning a pro-rata share of the assets and income of the separate account underlying the variable policy. Realized gains and income would be subject to current year taxation (but not unrealized appreciation of assets).

Tax Shelters Generally

These will be much less attractive once the reduced tax rates become effective on 1 January 1986. Also, repeal of the investment tax credit

and the special credit for rehabilitating or restoring historic buildings will gut the shelter value from some projects. Individuals considering highly-leveraged real estate deals should act before the end of the year, when "at risk" rules will be extended to real estate. These rules in substance limit an individual taxpayer's loss on any given investment to the sum of the taxpayer's cash or other property contributed to the deal and personal liability for repayment of borrowed funds. Similarly, investments made in 1985 in oil and gas drilling projects and in projects where expensive equipment will be placed in service before 1 January 1986 would benefit from more favorable tax treatment and write-off rules than those potentially applicable to 1986 ventures.

Considering Intra-Family Transactions

Considering setting up Clifford trusts to shift income to children under present law and keep your fingers crossed that Congress will grandfather pre–1986 trusts from new rules which would tax the income to the one who sets up the trust. Similarly, 1985 may be the last year that you can give large sums of money to children under fourteen (for example, by placing such assets in a custodial account under one of the Uniform Gifts to Minors Acts) and effectively shift the interest earned on such funds to the children. The way the proposal reads, interest or other income earned on such accounts on or after 1 January 1986 (even on those established in previous years) would be taxed to the child, but amounts in excess of $2,000 (the child's personal exemption) would be taxed at the parents' marginal tax rate. The child's tax liability on such unearned income (*i.e.*, over $2,000) would be equal to the additional tax his or her parents would owe if such income were added to the parents' taxable income and reported on their return.

Capital Gains

New rules will affect treatment of gains and losses on capital assets acquired or placed in service after 1985. Under no stretch of the imagination are they simple. Here is the gist of the changes: (1) all gain or loss is realized in real terms only, *i.e.*, adjusted for inflation occurring during the holding period; (2) with respect to depreciable property used in a trade or business, real gain is taxed as ordinary income and real loss is deductible in full against ordinary income; (3) current ACRS cost recovery periods are significantly stretched out to more realistically reflect total economic useful lives and with inflation-adjusted cost basis (for example, housing from 15 or 18 years to 28 years); (4) property not used in a trade or business, but constituting a capital asset (such as a personal residence), still gets capital gains treatment on the real gain and at slightly reduced rates—17.5% maximum rate; (5) homeowners fifty-five or older would get to exclude, on a one-time basis, the first $125,000 of inflation-adjusted gain on the sale of a principal residence. These rules, as explained in the only available source (the proposal narrative), are so confusing that it is difficult to make anything but general statements about how to approach the transition period. Logically, you should—whenever economically feasible—defer capital gains until on or after 1 July 1986 because the lower rates will then be applicable (even to assets acquired before the proposal's effective date). The report does say whether the rules for deferring gain on the sale of a principal residence will change. In reading this over and applying it to the typical tax concerns of military personnel, we see no obvious pitfalls or economic disadvantage.

Miscellaneous issues

Wherever possible, defer income until the new, lower tax rates come into force. But keep in mind the following:

(1) Repeal of income averaging may warrant accellerating bonuses or similar significant increases in nonfederal income so as to preserve, at least for 1985, a chance to use averaging (to the reduced extent allowed by the 1984 Tax Reform Act).

(2) Individual Retirement Accounts should be increased, once the proposal becomes law, to reflect the new $2,000 limit for a contribution on behalf of a nonworking spouse. Married couples with aggregate earnings of $4,000 or more could contribute

$2,000 each, regardless of how much of the total earnings was generated by either spouse. Just as under current law, maximum growth in these accounts depends in part on how early in the tax year one makes the allowed contributions.

(3) A death gratuity received by your survivors incident to your death on or after 1 January 1986 would probably be taxable income to the survivor due to the proposed repeal of the $5,000 exclusion of employer-provided death benefits. On the bright side, however, legislation is pending to increase the amount of the death gratuity from its current max of $3,000.

(4) If you are in line for a scholarship or fellowship, get a binding commitment from the donor before 1 January 1986 and amounts received through 1990 will be fully excludable from income. Otherwise, these will be fully taxable.

It must be repeated that only time will tell when and in what form the President's proposal will be adopted. Parts of it may be substantially revised by the Congress. Nevertheless, we thought this review of likely future changes would be useful. One final caution: this proposal is not a wholesale abandonment of the 1954 Tax Code or the majority of the tax law principles developed by the IRS and the courts. It is a major change, to be sure; but really just another in a series of major changes (1976, 1981, 1984, to name a few). Therefore, do not assume that principles or practices upon which you have relied are automatically out the window (for example, the rules for differentiating repairs from capital improvements in respect to rental property). Only in the specific situations set forth in the President's proposal are changes contemplated.

Sponsor Required to Report Status Change After Divorce

In counselling newly divorced service members, legal asistance officers should be aware of a revision of AR 608–3, para. 3–14*c*, Identification Cards, which holds military sponsors responsible for providing their personnel office with documentation necessary to terminate benefits and privileges for family members who are no longer eligible for them. Under the revision, sponsors must provide a copy of the final divorce decree to the personnel office immediately following their divorce to avoid being held financially responsibility for any benefits received by ineligible family members.

Frequently, service members fail to report divorces promptly or at all, yet their ex-spouses continue to patronize medical and other military facilities. Unauthorized use may become particularly significant where medical facilities or CHAMPUS are used.

Equitable Distribution of Unsused Annual Leave as a Marital Asset

Legal assistance officers frequently handle divorces for clients who have accrued, unused annual leave. In a recent Alaska case, the state supreme court analogized a state trooper's unused leave to pension benefits and thus deemed them to be a form of deferred compensation during the marriage which vested as the services were rendered. *Schober v. Schober*, 692 P.2d 267 (Alaska 1984). Irrespective of whether the right would survive the husband's death, the Alaska Supreme Court held that such an economic resource, easily capable of valuation, should have been included in the marital estate.

In *Schober*, the Alaska state trooper had accrued over 400 hours of unused personal leave at the time of his divorce. Pursuant to a collective bargaining agreement, accumulated leave could either be used as paid vacation or converted into cash. Though his argument failed before the supreme court, the trial court had held that his interest in the leave was contingent because the wife failed to prove that it would survive his death, and was thus not distributable as a marital asset.

In the analogous situation involving military personnel, the argument that accrued pay and allowances should be considered a marital asset could be stronger because the right to receive such accrued pay and allowances survives the death of the service member.

Inclusion in Bankruptcy Plan of Child Support Arrearages

Legal assistance attorneys frequently counsel service members on their support obligations for family members and occasionally give advice concerning bankruptcy actions. May a service member include child support arrearages in a Chapter 13 wage-earner plan? According to the Fourth Circuit's decision in *Caswell v. Lang*, 53 U.S.L.W. 2482 (4th Cir. Mar. 19, 1985), the answer is no.

In *Caswell*, a father subject to a Virginia state court order to provide child support proposed to pay-off support indebtedness to his ex-wife by creating two classes of unsecured creditors. One class would have consisted of his ex-wife (recipient of the child support arrearages) and the second class would have consisted of all other unsecured creditors. As authority, he cited two prior decisions from bankruptcy courts which permitted child support arrearages to be included in a Chapter 13 plan.

In rejecting the proposed plan, the Fourth Circuit pointed out that both prior bankruptcy court decisions, one from Missouri and the other from Oregon, failed to address the issue that child support obligations are markedly different from ordinary obligations in that they are nondischargeable in bankruptcy and may be enforced through state court contempt proceedings.

The court did not feel compelled to follow a bankruptcy court's interpretation of the law, and relied upon a frequently articulated U.S. Supreme Court principle favoring preservation of state courts' exclusive control over the collection of child support. In addition, the Fourth Circuit sought to avoid injustice to dependents which might result from requiring them to wait for a bankruptcy court to confirm the debtor's Chapter 13 plan before being allowed to enforce their state court-determined right to collect support payments. Furthermore, the court sought to prevent federal court interference with remedies provided by state courts in areas of particular state interest.

Raising Collateral Issues as Equitable Defenses in URESA Proceedings

Legal assistance officers should note a recent South Dakota Supreme Court decision holding that a custodial parent's interference with visitation rights may not be invoked as an equitable defense in a Uniform Reciprocal Enforcement of Support Act (URESA) proceeding *(Todd v. Pochop*, No. 14578 (S.D. Mar. 20, 1985). In this case, the interference engaged in by the custodial parent was so severe that the court characterized it as "grievous and at times contemptuous."

The court noted that South Dakota law precludes a father from withholding child support payments as an "extrajudicial method of obtaining visitation privileges" and that this law comports with the majority rule. The court noted that disallowing resolution of collateral family matters in URESA proceedings strengthens the Act's enforcement potential, pointing out that enforcement proceedings would be significantly impaired or deterred if matters of custody, visitation, or a custodial parent's contempt were to be considered by a responding court.

This case points out a common misperception by many noncustodial service member parents that they have the right to withhold child support where the custodial parent denies or interferes with visitation privileges.

A few states have nevertheless allowed collateral issues to be raised in URESA proceedings on occasion. *(See, e.g., Hethcox v. Hethcox*, 146 Ga. App. 430, 246 S.E.2d 444 (1978); *McLauchlin v. McLauchlin*, 372 Mich. 275, 267 N.E.2d 299 (1971); *New Jersey v. Morales*, 35 Ohio App. 2d 56, 299 N.E.2d 920 (1973); *Daly v. Daly*, 39 N.J. Super. 117, 120 A.2d 510, *aff'd*, 21 N.J. 599, 123 A.2d 3 (1956); *but cf. Brown v. Turnbloom*, 89 Mich. App. 162, 280 N.W.2d 473 (1979); *McCoy v. McCoy*, 53 Ohio App. 2d 331, 374 N.E.2d 164 (1977).) It should be noted that Michigan has expressly allowed collateral issues to be raised where the responding state is, as here in *Todd*, also the state of divorce. (See *Watkins v. Springsteen*, 301 N.W.2d 892 (Mich. App. 1981).

Tax News

The Family Home

Frequently, parties who are divorcing must decide how to divide the family residence. The Tax Reform Act of 1984 simplified the decision somewhat by treating any transfer of property between spouses or between former spouses, if incident to divorce, as a gift. This new rule generally applies to transfers after 18 July 1984.

If the parties retain the home jointly, however, the tax issues may become more complicated if the parties later dispose of the home. In a recent case, *Young v. Commissioner*, 11 Fam. L. Rep. (BNA) 1281 (T.C. Mar. 25, 1985) the husband retained a 25% interest in the home at the time of his 31 October 1975 divorce. The divorce decree gave his wife and daughter exclusive right to reside in the home; the husband moved out of the home and later remarried. In 1976, Mr. Young modified the decree, quitclaiming his remaining 25% interest in the house to his former wife in release of any further alimony obligations. In 1977, Mr. Young purchased a new home with his new wife. On his 1976 federal income tax return, he attempted to rollover the gain on his former residence into the new residence.

The Internal Revenue Service determined that at the time he disposed of his 25% interest in the home, it was not his primary residence for purposes of I.R.C. 1034(h). Rather, the IRS indicated that he had abandoned the home as his residence as of the date of his divorce, 31 October 1975, when he moved out and gave exclusive possession of it to his former wife and his child. The result was that Mr. Young was required to recognize a $8,350 gain.

Clients who are divorcing and considering retaining a part interest in a home that they will not be living in, should be advised of the possibility that the home will not be characterized as a primary residence if they should later dispose of their interest in the home, thus resulting in recognition of capital gain.

Home Replacement Period

The Tax Reform Act of 1984 amended I.R.C. § 1034(h) to provide some service members with a replacement period of up to eight years from the date of sale of an old residence in which to reinvest in a new, more expensive residence, and defer payment of tax on the gain. Under the new law, the eight-year rule would apply under two circumstances. The first circumstance is when a service member is stationed outside the United States. The second circumstance is when the service member, after returning from a tour outside the United States, is required to reside in on-base housing pursuant to a determination by the Secretary of Defense that adequate off-base housing is not available at a remote site. The statute indicated that the replacement period, as so suspended, would not expire before the last day that one of the circumstances continued to exist. If the service member had sold the home over four years ago, the wording of the statute arguably would cause the replacement period to expire the day that a service member returned to the United States, or, if the service member had been assigned overseas, it would expire the day the service member was no longer required to live on post. This would leave the individual in the position of having to both reinvest and live in a new residence within a day of returning from overseas or leaving government quarters.

An amendment to the law has been proposed in the Technical Corrections Act, H.R. 1800, S.Q. 814. The proposed bill would make the following amendment: "Paragraph (2) of section 1034(h) (relating to members of armed forces) is amended by striking out before the last day described' and inserting in lieu thereof before the day which is 1 year after the last day described'." The amendment, if passed, would clarify that service members would have at least one year in which to reinvest in a new home upon return from overseas or after leaving required quarters, except that the total period in which to reinvest could never extend beyond eight years from the date of sale of the old residence. It is hoped that this amendment, or a similar one, will be passed before the law becomes critical to service members. There is ample time for the legislation,

however, as the eight year rule only applies to homes sold after 18 July 1984.

State Activity Under Child Support Enforcement Amendments Act of 1984

The number of states enacting legislation to comply with the Child Support Enforcement Amendments of 1984 continues to increase. Provisions of the Act mandate that states have in place by 1 October 1985 a number of provisions to strengthen the enforcement of child support obligations and the collection of child support arrearages.

For example, Montana's new Child Support Enforcement Act of 1985 provides for the withholding of income from the salary of a person obligated to provide child support whenever an arrearage occurs that is equal to or more than one month's support obligation. The person whose pay will be subject to the involuntary withholding of the amount of the support obligation will be informed of the intended withholding action and thereafter has ten days to request a hearing. The request for the hearing must be in writing. The amount withheld each month will be the amount necessary to pay current support, plus an additional amount to pay all outstanding support arrearages within two years, and a fee of up to $5 per month to cover administrative costs.

Montana has also enacted a provision which permits consumer reporting agencies to request and receive from any child support agency personal or confidential information concerning an individual's overdue child support debt if the debt is $1,000 or more. If it is less than $1,000, the information may be made available at the option of the child support agency. Before requesting the information, the credit reporting agency is required to give notice to the individual about whom the information pertains that it is being requested. If the individual does not respond within thirty days, the information will be forwarded by the child support agency to the credit reporting agency.

The Georgia Child Support Recovery Act (Act 565) has also been expanded. Under the expanded act, any order of support entered or modified on or after 1 July 1985 must contain a provision that failure to make family support payments in an amount equal to one month's support will result in collection by continuing garnishment, and any order entered or modified prior to that date will be construed as a matter of law to contain that provision.

The Georgia statute gives a person against whom the continuing garnishment will be entered forty-five days after receiving the summons to answer and state what earnings he or she will receive from the time of service to the date of the answer. The individual must pay the amount subject to garnishment, up to fifty per cent of his or her disposable earnings, with the answer.

Indiana's new child support statute takes effect 1 September 1985. Under it, child support withholding orders must begin automatically whenever the person obligated to make such payments becomes delinquent in an amount equal to one month's support. The total withheld for current support, liquidation of arrearages, and a permissable employer's fee may not exceed the maximum permitted by federal law.

Texas "Lemon Law" Ruled Constitutional

Since Connecticut first passed its "lemon law" statute in 1982, thirty-four other states which have followed suit, many patterning their statutes after Connecticut's. "Lemon laws," as they have come to be known, typically permit purchasers of new motor vehicles to rescind the transaction where the purchaser has recurring problems with the vehicle during a specified period of time.

Many of the state statutes require that the purchaser exhaust all administrative remedies before initiating suit under the "lemon law" statute. The Texas statute, contains such a requirement, like that of Connecticut, which is based on a provision in the federal Magnusson-Moss Warranty Act that encourages such informal dispute resolution measures.

The Texas statute established a panel under the Texas Motor Vehicle Commission to provide a forum for these administrative complaints. The panel is comprised of private citizens and automobile dealers, with dealers being a majority of the membership. Chrylser Corporation initiated suit in federal court, contending that because dealers comprised a majority of the arbitration

panel, they would be unduly prejudiced against autombile manufacturers because they are "so at economic odds" that the commission cannot constitutionally adjudicate buyer-manufacturer complaints.

Although Chrysler prevailed in federal district court, the Fifth Circuit recently reversed, stating that Chrysler's complaints of possible temptation were "overdrawn." *See Chrysler Corp. v. Texas Motor Vehicle Commission*, 53 U.S.L.W. 2505 (5th cir. Apr. 16, 1985).

California Case on Pension Advice Malpractice

In a recent case, the California Supreme Court held that a civilian attorney was not entitled to summary dismissal of a former client's claim that he failed to properly advise her about her potential entitlement to a portion of her husband's military pension. In *Aloy v. Marsh*, 212 Cal. Rptr. 162, 38 Cal. 3d 413, 11 Fam. L. Rptr. (BNA) 1293 (Cal. Mar. 28, 1985), the attorney agrued that he gave the client proper advice, given the Supreme Court's subsequent ruling in *McCarty v. McCarty*, 453 U.S. 210 (1981).

The case is interesting because the advice rendered in California occurred in 1971, at a time when the client's husband was on active duty with the military but had served in excess of twenty years and was thus eligible to retire and begin drawing a pension. The attorney relied on a 1941 case in advising the client and did not discuss case law as it stood in California in 1971 with the client. The attorney argued that the advice he gave the client was vindicated ten years later by the *McCarty* decision, in which the Supreme Court held that a spouse could not claim a community interest in a service member's retirement pension. *McCarty* was subsequntly legislatively overruled by the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. The California Supreme Court held that the fact that *McCarty* subsequently invalidated the client's pension claim ws not a valid defense in light of the nonretroactive manner in which *McCarty* has been applied. Two justices dissented, remarking that this could be the only case where an attorney whose advice was correct could be held liable for malpractice.

The case illustrates, however, that legal assistance officers must be aware of the provisions of the Former Spouses' Act, which allows state courts to treat disposable retired pay as property solely of the member or as property of the member and the spouse, in accordance with the law of the jurisdiction.

Attorney General Involvement in Legal Assistance Cases

Every state has a consumer protection office or section within the Office of the State Attorney General, to which military legal assistance attorneys may refer clients. In fact, representatives of the Consumer Protection Section of the National Asssociation of Attorneys General, which met in Baltimore, Maryland, in May 1985, were highly complimentary of military attorneys and the assistance they provide in consumer law cases. Particularly singled out was the excellent documentation which military attorneys provide when referring clients to an attorney general consumer representative.

When military clients appear to be the victims of "scams" or other unscrupulous business activities, state attorneys general and the National Association of Attorneys General can be of invaluable assistance. Of recent interest among NAAG members has been business which defraud consumers, then when pressed with complaints by consumers, close unexpectedly, and declare bankruptcy.

Legal assistance attorneys with clients who complain of such activities should consider requesting the attorney general to intercede on behalf of consumers in these bankruptcy proceedings. Four examples of successful intevention by an Attorney General were given at the May NAAG Conference. These involved an insolvent health spa in Michigan, a nursing home in Massachusetts, a mobile TV service in Washington state, and a bankruptcy action attempted by World Financial Services in San Diego, California. The Michigan, Massachusetts, and Washington actions did not directly involve military personnel. However, the World Services case involves a lawsuit separate from the bankruptcy action brought by the California Attorney General on behalf of service members and other private citizens who were allegedly defrauded by

a chain of appliance and electronics stores in the Southern California area. That case was previously reported in the April 1985 edition of *The Army Lawyer*.

Army Nonsupport Policy Surveyed

Army Regulation 608–99, Support of Dependents, Paternity and Related Adoption Proceedings, is being revised by the Office of the Deputy Chief of Staff for Personnel. Although a personnel regulation, much AR 608–99's impact falls upon legal assistance attorneys, who must interpret the regulation, negotiate amounts of spousal or child support for their clients, or resolve disputes which arise under it.

The proponent of the regulation has solicited comment from legal assistance officers in the field. This was done by surveying legal assistance officers who attended the 16th Legal Assistance Course in March 1985 for their suggestions for improving the regulation, and by including a survey in Legal Assistance Mailout 85–2 to each legal assistance office.

Response to the survey has been excellent and all comments have been forwarded to the proponent. Those offices which have not returned the survey should do so immediately. It is anticipated that the regulation will be published in fall 1985.

Operation Stand-by Correction

The April 1985 edition of *The Army Lawyer*, at page 66, listed the contact persons for Operation Stand-by projects which have been promulgated in seven states under the encouragement of the American Bar Association's Standing Committee On Legal Assistance For Military Personnel. Operation Stand-by Committees are created on a state-by-state basis to provide military attorneys with a contact in the state to whom a state-specific legal assistance question may be addressed.

The name and address for the contact person for the District of Columbia should have read as follows:

Neil B. Kabatchnick, Chairman
Military Law Committee
Bar Association of the District of Columbia
1050 17th Street N.W., Suite 460
Washington, D.C. 20036

Legal Assistance Mailout 85–4

Materials collected from the Air Force, the Department of Justice, and the Consumer Information Center were distributed by the Legal Assistance Branch in late May 1985. These materials included:

A microfiche set of the Air Force State Law Studies, compiled by the Air Force Preventive Law and legal Aid Group. One Air Force legal office in each state was directed to conduct a current state law study. These studies, covering forty-nine states, are general reviews of state laws and are current as of late 1984 or early 1985. The Air Force provided sufficient copies to TJAGSA to provide one to each Army legal assistance office.

The Air Force also granted TJAGSA permission to reproduce and distribute materials used by an estate and financial planning team from the U.S. Air Force Academy which made a presentation at the 16th Legal Assistance Course at TJAGSA in March 1985. The handout materials contained much useful information for all legal assistance attorneys.

The Department of Justice was responsible for producing two publications on parental kidnapping and related subjects concerning children. These are entitled, "Parental Kidnapping: How to Prevent An Abduction and What To Do If Your child Is Abducted," and "Selected States Legislation: A Guide for Effective State laws to Protect Children." Bulk copies of both publications were obtained in sufficient quantities to provide one to each legal assistance office. These publications can provide the basis for preventive law articles, classes, or office or waiting room handouts.

Bulk copies of the Spring 1985 edition of the Consumer Information Catalog were also obtained and distributed to most legal assistance offices. In an earlier mailing, copies of the Winter 1984 catalog were sent to all legal assistance offices. However, the Consumer Information Center has reduced the number of bulk copies that it will provide. All large legal assistance offices at major installations should have received the Spring 1985 catalog.

Professional Responsibility Opinion 84–1

The Judge Advocate General's Professional Responsibility Advisory Committtee

The committee has been asked to advise whether a trial counsel and staff judge advocate violated the ABA Model Code of Professional Responsibility by their conduct, described below, concerning a prospective witness in a pending court-martial proceeding.

The prospective witness was a former coworker and roomate of a finance clerk charged with a single theft of money from his accounts in the finance office. After the charge against the finance clerk had been referred to trial before a special court-martial empowered to adjudge a bad-conduct discharge, an investigation was undertaken to determine whether the clerk also should be charged with a second larceny in connection with an earlier shortage in his accounts. The detailed trial counsel undertook this investigation. Interviewing the prospective witness, the trial counsel formed the conclusion that the witness was lying in denying that the accused had admitted the earlier theft to him and also in denying that the accused had admitted being a homosexual. The basis for this conclusion was a third person's report of a conversation with the witness, the witness' attitude and demeanor while being interviewed, and variances from his previous statements.

The trial counsel consulted his staff judge advocate, who agreed there was probable cause to believe that the witness was obstructing justice by lying and that, if he persisted in his denials, the trial counsel could so report to the military police and cause him to be apprehended for that offense, placed in the detention cell while being processed if provost marshal personnel permitted, and then turned over to his unit for determination as to disposition of the charge.

When the witness thereafter persisted in his denial that the accused had admitted homosexuality or the earlier larceny, the trial counsel did as planned. Military police were summoned and apprehended the witness on the trial counsel's complaint of obstructing justice and false swearing. At the military police station, the witness declined to waive his right to silence and requested a lawyer. He telephoned his friend, the accused. When the accused's detailed defense counsel (evidently the only member of the trial defense service present at the installation) arrived at the military police station and sought to consult with the witness, the trial counsel prevented him from doing so on the ground that an impermissible conflict of interest would arise from his representation of both the accused and the witness. In what appears to have been something of a shouting match, the defense counsel managed to convey to the witness his advice to remain silent. The witness evidently was well-behaved and the military policemen on duty declined to place him in the detention cell without a written authorization. Accordingly, the trial counsel signed a confinement order and the witness was placed in the detention cell in pretrial confinement. While the witness was being detained, his conversation with a military policeman caused him to believe that he would not be released until he had made a statement. He submitted to an interview, and, when the interview was finished, the military policeman telephoned the trial counsel, who was then interviewing some witnesses at another place. The military policeman left word that the witness had made a statement and asked to be advised whether there were any other question the trial counsel wanted answered. All copies of the statement obtained were delivered to and retained by the trial counsel who then authorized the release of the witness to his unit.

Investigation pursuant to Article 32 of the Uniform Code of Military Justice resulted in a decision to prosecute the accused finance clerk for the earlier larceny in addition to the charge that previously had been referred to the special court-martial. The accused's defense counsel filed a motion with the convening authority to remove the trial counsel on the basis that he had become an investigating officer and was, therefore, disqualified. *See* UCMJ art. 27(a)(2). On the advice of the staff judge advocate, when the charges against the accused were withdrawn from the special court-martial and rereferred to a general court-martial, a different trial counsel was appointed. The witness was not called to testify for either side at the trial.

The witness' subsequent complaint of his mistreatment to an inspector general resulted in an investigation pursuant to Army Regulation 27–1, chapter 5, on which the committee has based the foregoing description of events. The investigating officer concluded that the trial counsel had violated ABA Standard for Criminal Justice 3–3.1(b)(2d ed. 1980), which forbids a prosecutor's obtaining evidence by illegal means; in this case, confinement in a detention cell when regulatory criteria specified in Army Regulation 190–38, paragraph 4 (1978) (prevention of escape or prevention of harm to the detainee or others) were not met. The reviewing authority recommended that the staff judge advocate's ethical conduct be considered along with that of the trial counsel.

Afforded the opportunity to comment on those conclusions and recommendations, the staff judge advocate asserted that the witness was apprehended solely with a view to prosecution for the false statements and not for the purpose of obtaining evidence favorable to the prosecution of the accused, that the contemplated use of the detention cell only if authorized by military police regulations, and that he did not foresee that the trial counsel would preclude the witness from consulting with counsel, sign a pretrial confinement order, or cause a statement to be taken under those circumstances. The trial counsel, in his comment on the report of investigation, likewise asserted that the decision to apprehend the witness was made coincident with the decision that he was no longer to be used as a witness, but was only a suspect in his own right, that he was unaware that the witness had requested counsel. He contended that the trial defense counsel's real purpose in appearing at the MP station was only to assure the witness' silence concerning the accused rather than for the purpose of representing him.

Although a trial counsel may be disqualified for having assumed the role of a pretrial investigating officer, *see United States v. Clark*, 11 M.J. 179, 182 (CMA 1981), a trial counsel nevertheless must prepare adequately for trial and this entails interviewing witnesses. A witness may be reminded of the obligation for truthfulness and informed of the possible penalties for falsehood. *Cf.* ABA Standards for Criminal Justice 3–3.2(b). Certainly, also, a trial counsel may file a complaint of unlawful conduct observed, R.C.M. 301, and, as a commissioned officer, may apprehend a suspect upon probable cause, R.C.M. 302(b)(2), and may order pretrial restraint, UCMJ art. 11(b), R.C.M. 304(b)(2), 305(c).

At the point at which the trial counsel came to regard the prospective witness as no longer a witness, but, according to him, solely as a suspect, their relationship became essentially that of prosecutor and defendant. He was obliged not to interfere with the suspect's right to counsel. *See* ABA Standards for Criminal Justice 3–3.2(b), 4–2.1. Nor was he entitled at this juncture to enforce his own interpretation of the ethical rules concerning conflicts of interest, especially because a counsel might initially be provided for only a limited purpose, R.C.M. 305(f); furthermore, some conflicts can be waived by the respective clients. *See* ABA Standards for Criminal Justice 4–3.5; DR 5–105(c).

Equally important, the trial counsel was obliged not to interrogate or cause to be interrogated a suspect whose request for a lawyer not only had not been met, but, indeed, was in this case interfered with. *Cf.* DR 7–104(A) (lawyer's communication with persons of adverse interest).

The investigating officer concluded that the trial counsel violated the Standards for Criminal Jutice 3–3.1(b), which provides that "[i]t is unprofessional conduct for a prosecutor knowingly to use illegal means to obtain evidence or to employ or instruct or encourage others to use such means." This provision has no literal counterpart in the ABA Model Code of Professional Responsibility, *see* ABA Standards for Criminal Justice 3–1.1(e), but the tenor of the Code clearly is to forbid illegal prosecutorial activity. *See* DR 7–103; National District Attorneys Association, National Prosecution Standards 25.1 commentary at 417–19 (1977); ABA Model Rules of Professional Conduct, Rule 4.4 notes at 169 (Prosposed Final Draft, May 30, 1981).

The Model Code of Professional Responsibility does, however, specifically forbid, and authorizes imposition of professional discipline for, "conduct that is prejudicial to the administration of justice." DR 1–102(A)(5). The committee has no hes-

itancy in concluding that a trial counsel who prevents a defense counsel responding to the request of a suspect for a lawyer from even consulting the client, whose good faith in authorizing pretrial confinement seems clearly lacking, and who causes or knowingly permits counselless interrogation under these circumstances, is guilty of conduct prejudicial to the administration of justice.

The Committee concludes that the trial counsel engaged in conduct prejudicial to the administration of justice in violation of Disciplinary Rule 1–102(A)(5) of the Model Code of Professional Responsibility by causing the unnecessary incarceration of the witness; interfering with the witness' right to counsel; and by causing an uncounseled witness to be apprehended at his direction, then interrogated without ascertaining whether the witness had waived the rights to silence and to legal representation.

Unlike the new Model Rules of Professional Conduct—in which Rule 5.1(b) provides that a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct—the Model Code of Professional Responsibility includes no specific disciplinary rule dealing with the obligations of a supervisory lawyer.

In general, a supervisory lawyer is responsible for a subordinate's own violation of rules only if he orders it, ratifies it, or, knowing of the misconduct while its consequences can be avoided or mitigated, fails to take reasonable remedial action. On this basis, the committee does not find that the staff judge advocate himself violated the Model Code of Professional Responsibility. Nevertheless, the committee is of the opinion that the staff judge advocate failed to meet his responsibilities in this sensitive matter of pretrial incarceration of service members. The method and timing of the trial counsel's proposed course of action, including express reference to the detention cell and lack of any reference to the soldier's chain of command, should have served to alert the staff judge advocate to the likelihood of undesirable consequences.

After initially reviewing the report of the ensuing investigation, the major command's deputy staff judge advocate observed that the staff judge advocate "had the responsibility for making sure that . . . [the trial counsel] received sufficient guidance to avoid incidents like this . . . . [H]e is expected to know both the law and the procedures employed in the military criminal law system and assure they are not abused." The committee agrees and recommends that the appropriate supervising judge advocate remind him of this obligation.

Enlisted Update

Sergeant Major Walt Cybart

Civilianization of MOS 71E

The issue of civilianization of 71E spaces has caused concern throughout the Corps. To assist the field in evaluating responses to this issue, the following information is provided:

1. Potential for space imbalance and adverse impact on rotation base requirement.

MOS 71E is a low density MOS with only 125 positions (MTOE and TDA) authorized worldwide. Approximately 44% of these spaces are located in line units in overseas commands. Civilianization of any spaces in MOS 71E would adversely affect the turnaround time (TAT) between overseas assignments, and would result in

MOS 71E becoming a prime candidate for space—imbalanced MOS (SIMOS).

2. Grade imbalance and adverse impact on career progression requirements.

A recent change to the Standards of Grade Authorization (SGA) for MOS 71E was made to bring the MOS into compliance with the DA personnel Objective Support System—Enlisted (POSS–E) model for logical career progression. This change resulted in overages at grades E6, E7, and E8. The loss of any additional slots would compound the morale and attrition problems caused by these overages.

3. Adverse impact on reenlistment.

Civilianization would probably have an adverse impact on reenlistment by drawing experienced military personnel from active duty to compete for the civilian positions.

4. Excess expenditure of overtime funds and morale problems.

Positions should be designated military whenver they require unusual working hours or conditions not compatible (or normally associated) with civilian employment. Court reporters are normally required to work in excess of normal duty hours to accomplish their mission. Courts-martial and board proceedings often continue well beyond normal duty hours and the results of those proceedings must be transcribed and available to convening authorities shortly after adjournment. Use of civilians in the proceedings would result in significant expenditures of overtime funds and the erratic hours could produce morale problems. Morale problems are also exacerbated with military personnel when they see civilians doing similar jobs at usually higher pay, but under "regular" working conditions.

5. Replacement (recruitment) problems and absence of qualified civilians.

The cost of civilianization is a major consideration. The bulk of our military court reporter authorizations (98 out of 125) are in pay grades E5 and E6. To attract civilians to these jobs, we would be required to establish the positions at the GS–8 level as a minimum. Even at this level, we would have difficulty filling these positions in a time of war. Recent efforts to fill vacant positions have met with negative results largely because the pay scale is not adequate to attract qualified employees. As a result, there are no court reporters on the personnel registers at many locations.

6. Impairment of combat capability and adverse impact on commanders and soldiers.

All combat service support positions should be military if (a) they have tasks which, if not performed, could cause direct impairment of combat capability, and (b) they may be designated as sources of fillers for MTOE units during contingencies. Court reporters fit both of these AR 570–4 criteria for designation as military positions. The adverse impact would ultimately be borne by commanders and troops who will not receive the timely and efficient legal services required for discipline and morale.

7. Adverse impact on pretrained contingency or wartime augmentation.

Current positions for court reporters must remain designated as military to provide for immediately deployable, pretrained personnel for augmenting combat, combat support, and combat service support MTOE units.

CLE News

1. Mississippi CLE Requirements

Both active and inactive members of the Mississippi State Bar on active duty in the military are exempt from new mandatory CLE requirements that took effect in Mississippi after 1 January 1985. Inactive members on active duty (those who do not pay annual dues) do *not* have to claim any exemption. Active members on active duty (those who pay annual dues), however,

must claim this exemption in their annual report to the Mississippi State Bar. A form to claim this exemption will be provided to these individuals by the Mississippi State Bar. Any questions regarding your status should be directed to: Mississippi State Bar, P.O. Box 2168, Jackson, MS 39225-2168.

2. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

3. TJAGSA CLE Course Schedule

July 29–August 9: 104th Contract Attorneys Course (5F–F10).

August 1–16 May 1986: 34th Graduate Course (5–27–C22).

August 19–23: 9th Criminal Law New Developments Course (5F–F35).

August 26–30: 80th Senior Officers Legal Orientation Course (5F–F1).

September 9–13: 15th Criminal Trial Advocacy Course (5F–F32).

September 9–13: 31st Law of War Workshop (5F–F42).

September 16–27: 105th Contract Attorneys Course (5F–F10).

September 23–27: 7th Legal Aspects of Terrorism Course (5F–F43).

October 8–11: 1985 Worldwide JAG Conference.

October 15–20: December 1985: 108th Basic Course (5–27–C20).

October 21–25: 4th Advanced Federal Litigation Course (5F–F29).

October 28–1 November 1985: 17th Legal Assistance Course (5F–F23).

November 4–8: 81st Senior Officers Legal Orientation Course (5F–F1).

November 12–15: 21st Fiscal Law course (5F–F12).

November 18–22: 7th Claims Course (5F–F26).

December 2–13: 1st Advanced Acquisition Course (5F–F17).

December 16–20: 28th Federal Labor Relations Course (5F–F22).

January 13–17: 1986 Government Contract Law Symposium (5F–F11).

January 21–28 March 1986: 109th Basic Course (5–27–C20).

January 27–31: 16th Criminal Trial Advocacy Course (5F–F32).

February 3–7: 32nd Law of War Workshop (5F–F42).

February 10–14: 82nd Senior Officers Legal Orientation Course (5F–F1).

February 24–7 March 1986: 106th Contract Attorneys Course (5F–F10).

March 10–14: 1st Judge Advocate & Military Operations Seminar (5F–F47).

March 10–14: 10th Admin Law for Military Installations (5F–F24).

March 17–21: 2nd Administration & Law for Legal Clerks (512–71D/20/30).

March 24–28: 18th Legal Assistance Course (5F–F23).

April 1–4: JA USAR Workshop.

April 8–10: 6th Contract Attorneys Workshop (5F–F15).

April 14–18: 83d Senior Officers Legal Orientation Course (5F–F1).

April 21–25: 16th Staff Judge Advocate Course (5F–F52).

April 28–9 May 1986: 107th Contract Attorneys Course (5F–F10).

May 5–9: 29th Federal Labor Relations Course (5F–F22).

May 12–15: 22nd Fiscal Law Course (5F–F12).

May 19–6 June 1986: 29th Military Judge Course (5F–F33).

June 2–6: 84th Senior Officers Legal Orientation Course (5F–F1.

June 10–13: Chief Legal Clerk Workshop (512–71D/71E/40/50).

June 16–27: JATT Team Training.

June 16–27: JAOAC (Phase II).

July 7–11: U.S. Army Claims Service Training Seminar.

July 7–11: 15th Law Office Management Course (7A–713A).

July 14–18: Profesional Recruiting Training Seminar.

July 14–18: 33d Law of War Workshop (5F–F42).

July 21–26 September 1986: 110th Basic Course (5–27–C20).

July 28–8 August 1986: 108th Contract Attorneys Course (5F–F10).

August 4–22 May 1987: 35th Graduate Course (5–27–C22).

August 11–15: 10th Criminal Law New Developments Course (5F–F35).

September 8–12: 85th Senior Officers Legal Orientation Course (5F–F1).

4. Civilian Sponsored CLE Courses

October 1985

1: BLI, Legal Aspects of Data Processing Contracts, Redondo Beach, CA.

2: NCLE, Professional Responsibility, Omaha, NB.

3: NCLE, Basic Accounting for Lawyers, Omaha, NB.

3: SBT, Marshalling Evidence & Pre-Trial Discovery, Dallas, TX.

3–4: PLI, Managing the Small Law Firm, San Francisco, CA.

3–4: PLI, Managing the Medium-Sized Law Firm, San Francisco, CA.

3–4: PLI, Managing the Large Law Firm, San Francisco, CA.

3–5: ALIABA, Pension, Profit-Sharing & Deferred Compensation, Washington, DC.

4: GICLE, Eminent Domain, Atlanta, GA.

6–11: NJC, Managing Complex Litigation—Graduate, Reno, NV.

6–11: NJC, Victims & the Courts—Specialty, Reno, NV.

7–8: PLI, Section 1983 Civil Rights Litigation—Rec. Dev., New York, NY.

10: SBT, Marshalling Evidence & Pre-Trial Discovery, Fort Worth, TX.

10–12: GICLE, Insurance Law Institute, St. Simons Island, GA.

11: SBT, Marshalling Evidence & Pre-Trial Discovery, San Antonio, TX.

11–12: NCBF, Labor Law, Charleston, SC.

13–17: NCDA, Special Crimes—Investigation to Trial, Chicago, IL.

13–18: NJC, The Judge in Special Court—Graduate, Reno, NV.

14–16: FPI, Subcontracting, San Diego, CA.

15: BLI, Legal Aspects of Data Processing Contracts, Seattle, WA.

15–18: FPI, Pension Law Today, San Diego, CA.

16–18: FPI, Practical Environmental Law, San Diego, Ca.

17: SBT: Marshalling Evidence & Pre-Trial Discovery, Houston, TX.

17–18: GICLE, Corporate Counsel, Atlanta, Ga.

17–18: SLF, Institute of Labor Law, Westin, TX.

17–18: PLI, Institute of International Taxation, New York, NY.

17–18: ABA & ASLM, Second Medical Malpractice, Houston, TX.

17–19: GICLE, Workers Compensation Institute, St. Simons Island, GA.

18: SBT, Marshalling Evidence & Pre-Trial Discovery, Austin, TX.

20–24: NCDA, Office Administration & Management, Orlando, FL.

21–23: FPI, Changes in Government Contracts, Washington, DC.

22: LSBA, Recent Developments in the Law Seminar, Shreveport, LA.

23–25: SBT, Litigation, Austin, TX.

24–26: GICLE, Corporate Banking, Sea Island, GA.

25: GICLE, Employment Discrimination, Atlanta, Ga.

25: SBT, International Law, San Antonio, TX.

27–11/1: FPI, Skills of Contract Administration, Washington, DC.

28–29: PLI, Section 1983 Civil Rights Litigation—Rec. Dev., Chicago, IL.

28–30: FPI, Government Contract Costs, Monterey, CA.

28–30: FPI, Government Contracting for Engineers & Project Managers, Washington, DC.

29: BLI, Legal Aspects of Data Processing Contracts, Denver, CO.

31–11/1: GICLE, Insurance Law Institute (Video), Atlanta, GA.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 383-6516.

AAJE: American Academy of Judicial Education, Suite 903, 2025 Eye Street, N.W., Washington, DC 20006. (202) 775-0083.

ABA: American Bar Association, National Institutes, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6215.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE-NEWS; (215) 243-1630.

ARBA: Arkansas Bar Association, 400 West Markham Street, Little Rock, AR 77201. (501) 371-2024.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. Washington, DC 20007. (202) 965-3500.

BLI: Business Laws, Inc., 8228 Mayfield Road, Chesterfield, OH 44026.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037. (800) 424-9890; (202) 452-4420.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642-0223; (213) 825-5301.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706. (608) 262-3833.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

DRI: The Defense Research Institute, Inc., 750 North Lake Shore Drive, #5000, Chicago, IL 60611. (312) 944-0575.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, DC 20006. (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32301.

FPI: Federal Publications, Inc., 1725 K Street, N.W., Washington, DC 20006. (202) 337-7000.

GCP: Government Contracts Program, The George Washington University, Academic Center, T412, 801 Twenty-second Street, N.W., Washington, DC 20052. (202) 676-6815.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

IICLE: Illinois Institute for Continuing Legal Education, Chicago Conference Center, 29 South LaSalle Street, Suite 250, Chicago, IL 60603. (217) 787-2080.

ILT: The Institute for Law and Technology 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506. (606) 257-2922.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421-5722; (504) 566-1600.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803. (504) 388-5837.

MCLNEL: Massachusetts Continuing Legal Education, Inc., 44 School Street, Boston, MA 02109.

MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906.

MICLE: Institute of Continuing Legal Education, University of Michigan, Hutchins Hall, Ann Arbor, MI 48109.

MNCLE: Continuing Legal Education, A Division of the Minnesota State Bar Association, 40 North Milton, St. Paul, MN 55104.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.

NATCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCBF: North Carolina Bar Association Foundation, Inc., 1025 Wade Avenue, P.O. Box 12806, Raleigh, NC 27605.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8979, Reno, NV 89507-8978.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 American Charter Center, 206 South 13th Street, Lincoln, NB 68508.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 328-4815 ext. 225; (800) 752-4249 ext 225; (612) 644-0323.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NJCLE: Institute for Continuing Legal Education, 15 Washington Place, Suite 1400, Newark, NJ 07102.

NKUCCL: Northern Kentucky University, Chase College of Law, 1401 Dixie Highway, Covington, KY 41011. (606) 527-5444.

NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, DC 20006. (202) 452-0620.

NMCLE: State Bar of New Mexico, Continuing Legal Education, P.O. Box 25883, Albuquerque, NM 87125. (505) 842-6132.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 10038.

NYULS: New York University, School of Law, 40 Washington Sq. S., Room 321, New York, NY 10012. (212) 598-2756.

NYUSCE: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036. (212) 790-1320.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108. (800) 932-4637; (717) 233-5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700 ext. 271.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711. (512) 475-6842.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080. (214) 690-2377.
SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.
TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205.
TOURO: Touro College, Continuing Education Seminar Division, Office, Fifth Floor South, 1120 20th Street, N.W., Washington, DC 20036, (202) 337-7000.
TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.
UDCL: University of Denver College of Law, Seminar Division Office, Fifth Floor, 1120 20th Street, N.W., Washington, DC 20036, (202) 237-7000 and University of Denver, Program of Advanced Professional Development, College of Law, 200 West Fourteenth Avenue, Denver, CO 80204.
UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.
UMCC: University of Miami Conference Center, School of Continuing Studies, 400 S.E. Second Avenue, Miami, FL 33131. (305) 372-0140.
UMCCLE: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MO 65211.
UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816) 276-1648.
UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.
UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.
VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and the Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.
VUSL: Villanova University, School of Law, Villanova, PA 19085.
WSBA: Washington State Bar Association, 505 Madison Street, Seattle, WA 98104.

5. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1985 issue of The Army Lawyer.

Current Material of Interest

1. TJAGSA Publications Available Through DTIC

The following TJAGSA publications are available through the Defense Technical Information Center (DTIC): (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B086941	Criminal Law, Procedure, Pretrial Process/JAGS–ADC–84–1 (150 pgs.)
AD B086940	Criminal Law, Procedure, Trial/ JAGS–ADC–84–2 (100 pgs).
AD B086939	Criminal Law, Procedure, Post-trial/JAGS–ADC–84–3 (80 pgs).

AD B086937 Criminal Law, Evidence/JAGS–ADC–84–5 (90 pgs).
AD B086936 Criminal Law, Constitutional Evidence/JAGS–ADC–84–6 (200 pgs).
AD B086935 Criminal Law, Index/JAGS–ADC–84–7 (75 pgs).
AD B090375 Contract Law, Government Contract Law Deskbook Vol 1/ JAGS–ADK–85–1 (200 pgs).
AD B090376 Contract Law, Government Contract Law Deskbook Vol 2/ JAGS–ADK–85–2 (175 pgs).
AD B078095 Fiscal Law Deskbook/JAGS–ADK–83–1 (230 pgs).
AD B079015 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–84–1 (266 pgs).
AD B077739 All States Consumer Law Guide/ JAGS–ADA–83–1 (379 pgs).
AD B089093 LAO Federal Income Tax Supplement/JAGS–ADA–85–1 (129 pgs).
AD B077738 All States Will Guide/JAGS–ADA–83–2 (202 pgs).
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AD B086999 Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204 Uniform System of Military Citation/JAGS–DD–84–2 (38 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 27–10	Military Justice	Errata	15 Mar 85
AR 350–212	Training in Military Justice Matters		28 May 85
AR 550–51	Authority and Responsibility for Negotiating, Concluding, Forwarding, and Depositing of International Agreements		1 May 85
AR 600–21	Equal Opportunity Program in the Army		30 Apr 85
AR 600–290	Passports and Visas		24 Apr 85
AR 635–5	Separation Documents	105	29 Apr 85
UPDATE 4	Officer Ranks Personnel		30 Apr 85
UPDATE 6	Morale, Welfare and Recreation		20 May 85
UPDATE 7	Unit Supply		1 May 85
UPDATE 12	Reserve Components Personnel		1 May 85

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:
DONALD J. DELANDRO
Brigadier General, United States Army
The Adjutant General

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